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COMMITTEE AGAINST TORTURE

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION

Initial reports of States parties due in 1999

Addendum

KAZAKHSTAN

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Introduction

1. This report is submitted in accordance with article 19, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which entered into force for the Republic of Kazakhstan on 26 June 1998 following its ratification. It has been compiled in accordance with the guidelines on layout and content of initial reports submitted by States parties pursuant to article 19, paragraph 1, of the Convention and the amendments to the general guidelines of 26 April 1991, adopted at the 82nd meeting of the United Nations Committee against Torture.

2. The report covers the period 1998-1999.

3. It was prepared by the Human Rights Commission attached to the Office of the President of the Republic of Kazakhstan in cooperation with the Ministry of Justice, the Ministry of Internal Affairs, the Office of the Procurator-General and the National Security Committee.

I. GENERAL INFORMATION

4. A complex process of building up a democratic and social State subject to the rule of law is proceeding in the Republic of Kazakhstan in accordance with the policy outlined in its 1995 Constitution.

5. Kazakhstan, as a State Member of the United Nations, recognizes that the provisions of the Charter of the United Nations take precedence over those of other international agreements. It is fully committed to the implementation of the provisions of the Charter of the United Nations and their incorporation in national legislation. A significant feature of the country's Constitution is that it embodies the widest possible range of civil, political, economic, social and cultural rights of citizens, reflecting generally recognized international human rights standards and their classification in accordance with the Universal Declaration of Human Rights. This is clear from the fact that 30 of the 98 articles comprising the Constitution proclaim the rights, freedoms and obligations of the individual. The basis for the inclusion of these articles in the Constitution is the priority given to the life, rights and freedoms of the individual.

6. Article 14 of the Constitution states that everyone is equal before the law and that "No one shall be subject to any discrimination for reasons of origin, social status, property status, occupation, sex, race, nationality, language, attitude towards religion, convictions, place of residence or any other circumstances". On this basis, Kazakhstan's criminal legislation provides for punishment in cases of discrimination and the use of torture.

7. The Constitution not only describes the various functions of the legislature, executive and judiciary but also covers basic issues connected with the reform of the law enforcement system. The new Criminal Code, Code of Criminal Procedure and Code for the Execution of Criminal

Penalties adopted in 1997 are based on the rule of law, justice, the equality of citizens before the law, personal responsibility, humanism and the individualization of criminal responsibility and punishment.

8. According to article 17 of the Constitution, which carries the greatest legal force and is directly applicable throughout the country, "No one must be subject to torture, violence or other treatment and punishment that is cruel or humiliating to human dignity".

9. This constitutional provision is elaborated upon in the Criminal Code, the Code of Criminal Procedure and the Code for the Execution of Criminal Penalties. These Codes embody a sufficient number of norms that brand all acts of torture as offences and forbid their use in criminal proceedings as well as in the course of a sentence being served by a prisoner.

10. The Criminal Code is consistent in dealing with the inadmissibility of torture since its provisions provide for the criminal responsibility and punishment of officials and bodies in charge of criminal proceedings who violate due process and the execution of punishment, including the infliction of torture, and other cruel or degrading treatment or punishment.

11. The use of torture is regarded as an aggravating circumstance in respect of criminal responsibility and punishment.

12. A direct reference is made to the term "torture" in article 107, entitled "Systematic or brutal violence", and article 347, entitled "Coercion to testify", of the Criminal Code. Article 107 states that "The infliction of physical or mental suffering by systematic beatings or other violent methods including the use of torture shall be punishable by restriction of liberty for a period of up to five years or deprivation of liberty for a period of from three to seven years." Article 347 states that "Coercion of a suspect, accused person, injured party or witness to testify or of an expert to present his conclusions by means of threats, blackmail or other unlawful methods on the part of an investigator or the person conducting an initial inquiry, accompanied by the use of violence, bullying or torture shall be punishable by deprivation of freedom for a period of from three to eight years." On the basis of this article, the personnel of law enforcement agencies are held criminally responsible for the use of torture or for participating in its use either actively or by failure to act.

13. The definition of the term "torture" given in the Commentary on the Criminal Code of the Republic of Kazakhstan and constituting the official interpretation of the Code reflects the provisions of article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: "Torture is regarded as constituting acts that cause physical or mental suffering such as beating, twisting of the wrists, the use of painful methods, inflicting burns on the body, the prolonged and systematic infliction of pain, etc." (article 347 of the Criminal Code). In this connection, article 107 of the Commentary states that the term "Systematic or brutal violence involving torture covers cases when, in order to cause physical or mental suffering, particularly sophisticated methods are employed to affect the human body. These include the use of electric shocks, red-hot irons, fire, etc.". However, in accordance with

article 4, paragraph 3, of the Constitution, "International treaties ratified by the Republic shall have priority over its laws and be directly implemented except in cases when the application of an international treaty requires the promulgation of a law." On the basis of these provisions, the definition of the term torture given in the Constitution can be officially used for purposes of law enforcement.

14. According to the Convention, the term torture implies its use only by a public official or another person acting in an official capacity with his consent or acquiescence, whereas under Kazakhstan's criminal legislation not only public officials but also other persons using torture in order to commit an unlawful act are held criminally responsible for their acts (article 107 of the Criminal Code).

15. In view of the fact that the Committee against Torture has expressed the view that torture should be defined as a separate offence in the domestic legislation of States parties, Kazakh jurists consider that they should explore the possibility of introducing a separate article in chapter 13 of the Criminal Code, entitled "Offences against the interests of the civil service", with a view to holding persons engaging in torture and other cruel, inhuman or degrading treatment or punishment responsible for their acts.

16. There is a particularly close link between the Criminal Code and the Code of Criminal Procedure, which governs the activities of bodies responsible for criminal proceedings.

17. The activities inherent in and the principles of criminal proceedings place the bodies responsible for such proceedings under a duty to protect the rights and freedoms of citizens in the course of their activities.

18. The Constitution and the international agreements ratified by Kazakhstan are an integral part of legislation covering criminal procedure and must be strictly complied with in the course of criminal proceedings.

19. The Code for the Execution of Criminal Penalties has considerably extended the rights of persons who have been convicted and increased the effectiveness of the social and legal protection available to them.

20. The State's policy in this area as reflected in national legislation on the subject completely excludes the use of torture and other cruel, inhuman or degrading treatment or punishment from the armoury of methods used to combat crime.

21. Under Kazakhstan's national legislation, matters covered by the Convention are dealt with by the Supreme Court and the Office of the Procurator-General. Various internal affairs bodies are also competent to consider questions that arise in connection with the functioning of the Convention (mainly the Committee on the Execution of Criminal Penalties attached to the Ministry of Internal Affairs). Citizens are entitled to appeal to these bodies, as well as to the Human Rights Commission attached to the Office of the President, in the event that they are subjected to torture or other cruel, inhuman or degrading treatment or punishment.

II. INFORMATION IN RESPECT OF EACH ARTICLE OF PART I OF THE CONVENTION

Article 2

22. The Republic of Kazakhstan recently adopted additional legislation to prevent the commission of acts of torture in its territory. The regulatory acts adopted by Kazakhstan contain a number of important provisions aimed at the more forceful application of the norms set out in the Convention. These include:

(a) Act of 30 March 1999 on procedures and conditions for holding persons suspected or accused of a crime in custody;

(b) Act of 13 July 1999 granting amnesty in connection with the Year of solidarity between successive generations;

(c) Decree of 21 December 1995 of the President of the Republic of Kazakhstan having the force of law concerning the internal affairs bodies of the Republic of Kazakhstan;

(d) Decision of 1 October 1996 of the Government of the Republic of Kazakhstan on measures to harmonize the activities of organs responsible for the execution of criminal penalties and places of pre-trial detention in the Republic of Kazakhstan;

(e) Order No. 630 of 14 December 1999 of the Ministry of Internal Affairs confirming the in-house regulations of the remand centres of the Ministry of Internal Affairs of the Republic of Kazakhstan.

23. The above acts, together with the Criminal Code, the Code of Criminal Procedure and the Code for the Execution of Criminal Penalties, constitute the basic regulatory instruments that establish criminal responsibility for the use of torture and other cruel, inhuman or degrading treatment or punishment.

24. An order from a superior or State official cannot, under Kazakhstan's legislation, be invoked to justify torture.

25. The criminal responsibility of State officials for acts beyond their immediate official duties is specifically regulated by the provisions of the Criminal Code. Action ultra vires is defined as an offence in article 308 of the Criminal Code:

> "Action ultra vires - namely, acts performed by an official that clearly exceed his rights and powers and that constitute an important violation of the rights and legitimate interests of citizens or organizations or of the lawful interests of society or the State - by a person occupying a responsible official position and having serious implications shall be punished by deprivation of liberty for a period of up to 10 years and deprivation of the right to occupy certain positions or engage in certain activities for a period of up to 3 years".

26. Action ultra vires constitutes a special form of the abuse of official position. The difference between this type of offence and other forms of official misconduct is that action ultra vires is clearly beyond a person's powers and authority.

27. Criminal responsibility for the use of torture and other cruel, inhuman or degrading treatment or punishment is established not only in peacetime but also in times of war. Article 159, paragraph 1, of the Criminal Code states that:

> "The cruel treatment of prisoners of war or civilians, the deportation of the civilian population, the pillaging of national property in occupied territory, the use during an armed conflict of means and methods prohibited by an international agreement with the Republic of Kazakhstan shall be punishable by deprivation of liberty for a period of up to 12 years".

28. This provision is based on the Hague Conventions on Land Warfare of 1899 and 1907 and on other international instruments prohibiting the use of means and methods of waging warfare that cause unjustified suffering to the participants in an armed conflict and to the peaceful population.

29. Under Kazakhstan's legislation, the order of a superior officer or a public authority cannot be used to justify torture.

30. Kazakhstan's legislation contains no reservations concerning the possibility of using torture in exceptional circumstances.

Article 3

31. Article 11 of the Constitution states that:

> "1. A citizen of the Republic of Kazakhstan may not be extradited to a foreign State unless otherwise stipulated by international treaties of the Republic.
>
> "2. The Republic shall guarantee its citizens protection and patronage outside its boundaries".

32. Article 8 of the Criminal Code accordingly stipulates:

> "1. Citizens of the Republic of Kazakhstan who have committed an offence in the territory of another State shall not be extradited to that State unless otherwise provided in international agreements.
>
> "2. Foreigners and stateless persons who have committed an offence outside the Republic of Kazakhstan and are present in the territory of the Republic of Kazakhstan may be extradited to a foreign State for criminal prosecution or to serve their sentence in accordance with an international agreement with the Republic of Kazakhstan".

33. A person who has committed an offence and is present in the territory of the Republic of Kazakhstan may accordingly be extradited to another State only on the basis of an international agreement that has been concluded.

34. Foreigners and stateless persons may, in the circumstances indicated in article 8, paragraph 2, of the Criminal Code, be extradited to a foreign State. Persons who have been granted political asylum in Kazakhstan may not, however, be extradited. According to article 44 (14) of the Constitution, issues of political asylum are resolved by the Head of State. Decree No. 3057 of the President of the Republic of Kazakhstan dated 15 July 1996 on the granting of political asylum to foreign citizens and stateless persons in the Republic of Kazakhstan states that the Republic of Kazakhstan grants political asylum to persons and members of their family seeking asylum and protection from persecution or because they are in real danger of persecution in the country of their citizenship and/or residence for their socio-political activities, race, nationality or religious beliefs, as well as in cases of human rights violations specified in international legal instruments.

35. According to article 7 of the Criminal Code, citizens, stateless persons and members of the armed forces of the Republic of Kazakhstan are held responsible in accordance with Kazakhstan's criminal legislation for offences committed in the territory of another State. Their punishment may not exceed the maximum provided for by the laws of the State in whose territory the offence was committed.

36. At the present time Kazakhstan resolves issues involving the extradition of offenders on the basis of international agreements. One of the necessary conditions for extradition is the existence of an international treaty with the Republic of Kazakhstan. For example, on 22 January 1993 the States members of the Commonwealth of Independent States concluded a Convention on Judicial Assistance and Judicial Relations in Civil, Family and Criminal Cases.

37. Under article 57 (b) of that Convention, "Extradition shall be refused if, in the territory of the requesting contracting party, an enforceable judgement has been handed down or decision adopted in connection with the same offence to drop proceedings in respect of the person whose extradition is sought".

38. Moreover, under article 80 of this Convention, matters connected with extradition and criminal prosecution are to be discussed between the procurators-general of the contracting parties.

39. In the absence of an international agreement with a particular State, the question of extradition is resolved through the diplomatic channel. In this case, the diplomatic service of the Republic of Kazakhstan will examine the question in the light of information on the use of torture or other cruel, inhuman or degrading treatment or punishment by the person whose extradition is requested by the foreign State.

Article 4

40. The provisions of the Convention against Torture and of the Constitution of the Republic of Kazakhstan have been given effect in the form of a body of legal norms governing criminal responsibility and the punishment of officials and State bodies for the use of torture or other cruel, inhuman or degrading treatment or punishment.

41. Kazakhstan's Criminal Code contains no provisions that specifically establish responsibility for torture. However, it does provide for punishment for the following types of offences:

(a) Coercion to testify (art. 347); (maximum punishment - 8 years' deprivation of liberty);

(b) Subornation or coercion to give false testimony or to evade giving testimony, to present untruthful conclusions or an incorrect translation/interpretation (art. 354) (maximum punishment - 8 years' deprivation of liberty);

(c) Action ultra vires (art. 308) (maximum punishment - 10 years' deprivation of liberty);

(d) Deliberate unlawful detention, pre-trial detention or holding in custody (art. 346) (maximum punishment - 8 years' deprivation of liberty);

(e) Abuse of authority, exceeding powers or failure to act (art. 380) (maximum punishment in peacetime - 10 years' deprivation of liberty; in wartime or in a conflict - up to 20 years or capital punishment);

(f) Systematic or brutal violence (art. 107) (maximum punishment - 7 years' deprivation of liberty);

(g) Unlawful placement in a psychiatric institution (art. 127) (maximum punishment - 7 years' deprivation of liberty).

42. The use of extreme violence, sadism and bullying in the commission of an offence as well as torture of the victim is, under article 54 of the Criminal Code, regarded as an aggravating circumstance from the standpoint of criminal responsibility and punishment.

43. Other kinds of cruel, inhuman or degrading treatment or punishment are punishable under various articles of the Criminal Code as follows: article 125 entitled "Abduction" - deprivation of liberty from 10 to 15 years, with or without confiscation of property; article 126 entitled "Illegal deprivation of liberty" - deprivation of liberty from 5 to 10 years with or without confiscation of property; article 127 entitled "Illegal placement in a psychiatric institution" - deprivation of liberty from 3 to 10 years with or without deprivation of the right to occupy certain positions or engage in certain activities for a period of up to three years; article 307

entitled "Abuse of official functions" - deprivation of liberty for up to eight years and deprivation of the right to occupy certain positions or engage in certain activities for a period of up to three years.

44. Complicity is defined in article 23 of the Criminal Code as the intentional joint participation of two or more persons in the deliberate commission of an offence. A clear distinction between the persons participating in the commission of an offence is made in article 28, paragraph 1, of the Criminal Code which defines them as the perpetrator, the person who organizes the crime, the instigator and the accomplice.

45. All the participants (in accordance with articles 107 and 347 of the Criminal Code) are held criminally responsible under the basic article, with reference to article 28 of the Criminal Code, depending on the nature and extent of the participation of each one.

46. Articles 107 and 347 of the Criminal Code establish criminal responsibility for the preparation of an offence, an incompleted offence and for an attempt to commit an offence, with reference to article 24 of the Criminal Code.

47. This concept is refined in article 24 of the Criminal Code as follows:

> "Preparations to commit an offence comprise the intentional acquisition, fabrication or adaptation of the instruments or devices to be used, the search for persons to participate in the commission of the offence, the agreement to commit the offence or any other intentional creation of conditions for the commission of the offence if it was not actually carried out for reasons beyond the control of those concerned.
>
> "By attempt to commit an offence is meant intentional action (or lack of action) to commit an offence, provided that it was not actually carried out for reasons beyond the control of those concerned."

Article 5

48. Article 6 of the Criminal Code of Kazakhstan states that "Any person who commits an offence in the territory of the Republic of Kazakhstan shall be held responsible for his act under this Code." By offence committed in the territory of the Republic of Kazakhstan is meant an act which was initiated or continued or yet was completed in the territory of the Republic of Kazakhstan. The territory of the Republic of Kazakhstan includes the continental shelf, the exclusive economic zone and military aircraft and vessels. Persons who commit an offence on civilian aircraft or vessels registered at a port of the Republic of Kazakhstan but which happen to be outside the Republic also incur criminal responsibility unless otherwise provided in international agreements.

49. According to the Act of 13 January 1993 on the State boundary of Kazakhstan, its national territory includes the land within the State boundary as well as the territorial sea, inland waters and the waters of rivers and other bodies of water, the banks of which are within the territory of the Republic of Kazakhstan.

50. Persons committing offences in the territory of Kazakhstan are held responsible for their acts under the Criminal Code. An offence committed by a group of persons in the territory of a number of States raises the question of establishing Kazakhstan's jurisdiction. If the offence is committed by a number of persons acting in concert they are held responsible for their act under the Criminal Code not only if the organizer, instigator and accomplice acted in the territory of Kazakhstan and the actual perpetrator acted outside its boundaries, but also if the accomplices acted outside its boundaries and the perpetrator acted in the territory of Kazakhstan.

51. The Republic of Kazakhstan also has exclusive jurisdiction over offences committed on its military aircraft or vessels, regardless where they may be. In the case of the armed forces, a Kazakh citizen who commits an offence in an area where military units are stationed outside Kazakhstan incurs criminal responsibility under the Criminal Code for offences committed in his official capacity, military offences, as well as offences against the interests of his country. As a rule, servicemen are held responsible under the laws of the country in which they happen to be for offences of a general criminal nature committed outside the area where military units are stationed.

52. Kazakhstan's criminal legislation is not applicable to persons enjoying diplomatic immunity. Such persons are listed in article 501 of the Code of Criminal Procedure.

53. Foreign nationals who are diplomatic representatives of a foreign State and other persons enjoying immunity who commit an offence in the territory of the Republic of Kazakhstan are held responsible for their act in accordance with the provisions of international instruments.

54. Article 7, paragraph 4, of the Criminal Code states that foreigners who commit an offence outside the Republic of Kazakhstan shall be held responsible for their act if their offence is directed against the interests of the Republic of Kazakhstan, as well as in cases provided for in international treaties signed by Kazakhstan provided that they have not been convicted in another State and are brought to trial in the territory of the Republic of Kazakhstan.

55. According to article 7, paragraph 3, of the Criminal Code, citizens of the Republic of Kazakhstan who have committed an offence outside the Republic are held criminally responsible under this Code if the act they committed is recognized as an offence in the State in whose territory it was committed and if such persons have not been convicted in the other State. Their punishment may not exceed the maximum punishment provided for under the law of the State in whose territory the offence was committed. Stateless persons are held responsible on the same basis. Kazakh citizens are held criminally responsible only if the offence they committed abroad is held to be an offence in the State in whose territory it was committed, if they have not been convicted in the other State and, obviously, if their act is held to be an offence under the criminal legislation of the Republic of Kazakhstan. If it is established that a Kazakh citizen is at risk of being subjected to torture or other cruel, inhuman or degrading treatment or punishment in the territory of the State in which he committed an offence, he is held responsible for his offence under the criminal legislation of the Republic of Kazakhstan.

56. The legislation of the Republic of Kazakhstan contains no provisions establishing Kazakhstan's jurisdiction in cases where a crime has been committed abroad against the life, health, honour, dignity and other rights and legitimate interests of Kazakh citizens.

Article 6

57. Criminal proceedings, regardless of where an offence was committed in the territory of the Republic, are instituted in accordance with Kazakhstan's legislation on criminal procedure which considerably extends the procedural rights of citizens and guarantees the protection of their rights and the inviolability of the individual. The basic regulatory act governing such matters is the Code of Criminal Procedure of the Republic of Kazakhstan.

58. Article 16 of the country's Constitution states that persons may be arrested and held in custody only in cases provided for by law and only with the sanction of a court or procurator, and that such persons shall be provided with the right to appeal. Without the sanction of a procurator, a person may be held in custody for a period of not more than 72 hours. Article 14 of the Code of Criminal Procedure states that:

> "1. No one may be detained on suspicion of having committed an offence, remanded in custody or deprived of his liberty in any other manner except on the basis of and in accordance with the procedure laid down in this Code.
>
> "2. A person may be arrested and held in custody only in the cases provided for by this Code and only on the order of a court or procurator, and must be granted the right to appeal. He may be detained for a period of not more than 72 hours in the absence of a procurator's sanction. The compulsory placement of a person not being held in custody in a medical establishment for psychiatric examination is permitted only by decision of a court. The compulsory placement of a person not being held in custody in a medical establishment for medical examination is permitted only by decision of a court or with the approval of the procurator.
>
> "3. Any person detained is immediately notified of the reason for his detention as well as the legal description of the offence of which he is suspected or accused.
>
> "4. The court and criminal investigation bodies are required to release any person who is illegally detained, remanded in custody or unlawfully placed in a medical establishment or held in custody for a period exceeding that provided by law or a sentence.
>
> "5. No person participating in criminal proceedings may be subjected to violence or cruel or degrading treatment.
>
> "6. No person may be induced to participate in procedural acts that endanger the life or health of an individual. Procedural acts infringing the inviolability of an individual may be taken against his wishes or his legal representative only in cases and on the basis of the procedure specifically provided for by this Code.
>
> "7. The conditions of detention of a person who has been remanded in custody as a preventive measure as well as of a person who has been detained on suspicion of having committed an offence must be such as to preclude any danger to his life or health.

"8. Any injury caused to a citizen as a result of unlawful deprivation of liberty, detention in conditions endangering his life or health, or brutal treatment shall be compensated in accordance with the procedure laid down in this Code."

59. On 30 March 1999 the President of Kazakhstan signed the Act on procedures and conditions for holding in custody persons suspected or accused of committing an offence. The purpose of this Act, according to its article 1, is to regulate the procedure and specify the conditions for holding in custody persons suspected or accused of committing an offence and to guarantee their rights and legitimate interests.

60. Of particular importance is article 3, which states that "holding in custody must be in accordance with the principles of legality, presumption of innocence, the equality of citizens before the law, humanism and respect for the honour and dignity of the individual according to international law, and must not be accompanied by acts intended to cause physical or mental suffering to the person suspected or accused of committing an offence and being held in custody".

61. Section 2 of the Act deals with the rights of suspects and accused persons and the ways in which they are guaranteed. Judicial assistance may be provided to the investigating bodies and courts of other States with which Kazakhstan has concluded an international judicial assistance agreement, or on the basis of reciprocity, through the procedural action envisaged in Kazakhstan's criminal procedure legislation, as well as through other procedures for which provision is made in the legislation of Kazakhstan and the international agreements to which it is a party. Article 525 of Kazakhstan's Code of Criminal Procedure states that:

"1. The court, procurator, investigator and body conducting an initial inquiry shall, in accordance with established procedure, carry out the instructions received from the competent agencies and officials of other States concerning the conduct of investigations or judicial operations under the general rules of this Code.

"2. The procedural rules of the other State may be followed in giving effect to these instructions if this is provided for in the international agreement between the Republic of Kazakhstan and that State.

"...

"4. With the consent of the official referred to in the first part of article 523 of Kazakhstan's Code of Criminal Procedure, and in cases provided for in an international agreement, a representative of the competent agency of the other State may participate in the execution of these instructions.

"5. If the instructions cannot be carried out, the documents received shall be returned through the Office of the Procurator-General of the Republic of Kazakhstan or the Ministry of Justice of the Republic of Kazakhstan to the foreign agency which made the request together with an indication of the reasons why it could not be acted on. In any event, the request itself is returned if compliance with it might affect the sovereignty or security of the Republic of Kazakhstan or if it is at variance with its legislation."

62. Requests for the extradition of the citizen of another State are covered by article 531 of the Code of Criminal Procedure which states:

> "1. A request for the extradition of a citizen of another State accused of committing an offence or convicted in the territory of another State shall be examined by the Procurator-General of the Republic of Kazakhstan or a duly authorized procurator, whose decision shall form the basis for compliance with the request.
>
> "2. Extradition conditions and procedures are defined in this Code and the international agreement between the Republic of Kazakhstan and the other State ...
>
> "...
>
> "5. The administration of the place where the person is being held in custody is required, on receipt of the extradition decision of the Procurator-General of the Republic of Kazakhstan or a duly authorized procurator, to organize the transfer under guard of the person in question to the appropriate agency of the State to which he is being extradited and to notify the Procurator-General of the Republic of Kazakhstan or the duly authorized procurator that extradition has been effected."

63. If a request presented in due form is received from the competent agency of another State and if there are legitimate grounds for the extradition of the person in question he may be detained and a preventive measure consisting in arrest for extradition purposes adopted. The person may be arrested even before the extradition request has been received if the requesting State so desires.

64. The agencies of the State that has transmitted, or may transmit, a request for extradition or arrest shall be immediately informed when the person in question has been remanded in custody and notified of the proposed time and place of extradition (article 534 of the Code of Criminal Procedure of the Republic of Kazakhstan).

65. The extradition request may be refused under article 532 of the Code of Criminal Procedure if:

> "1. The person in question has been granted political asylum by the Republic of Kazakhstan;
>
> "2. The acts on which the request for extradition is based are not recognized as constituting an offence in the Republic of Kazakhstan;
>
> "3. A sentence which has become effective has already been handed down against the person in question or if the case against him has been dropped;
>
> "4. Criminal proceedings cannot be instituted under the legislation of the Republic of Kazakhstan or a sentence cannot be executed because of extinction of the right of action or for other legitimate reasons;

"5. The extradition request may be refused if the offence in connection with which it is made has been committed either within or outside the territory of the Republic of Kazakhstan and directed against the interests of the Republic of Kazakhstan."

66. Provisions concerning foreigners are contained in article 138 (2) of Kazakhstan's Code of Criminal Procedure:

"1. If the detainee is a citizen of another State, the embassy, consulate or other representative of that State must be notified of the fact in the time specified ...

"2. The person in question may be detained for up to three days even in the absence of the request referred to in the first part of this article if there are legitimate grounds for believing that he committed an offence in the territory of another State entailing extradition ...

"...

"4. If the person being detained in custody has not been extradited within a period of 30 days, the procurator must order his release ...."

67. A detainee is held in custody for extradition purposes by the procurator for a period of up to one month. This period may be extended by the oblast procurator or other procurator at the same level for up to two months. In exceptional circumstances the period of detention for extradition purposes may, at the request of the oblast procurator or other procurator at the same level, be extended by the Procurator-General of the Republic of Kazakhstan or a duly authorized procurator for up to three months (article 534 of the Code of Criminal Procedure of the Republic of Kazakhstan).

Article 7

68. If a request for the extradition of a person to another State is refused on the grounds indicated in article 532 of the Code of Criminal Procedure, the Republic of Kazakhstan initiates criminal proceedings on the basis of the relevant criminal legislation. Article 12 of the Constitution states that "Foreigners and stateless persons in the Republic shall enjoy the rights and freedoms and assume the responsibilities established for citizens unless otherwise stipulated by the Constitution, laws and international treaties".

69. The exercise of the rights and freedoms of the individual and citizen must not violate the rights and freedoms of other persons or affect the constitutional system and public morals.

70. Article 21 of the Code of Criminal Procedure states that justice is administered on the basis of the equality of all before the law and the courts. No person may, in the course of criminal proceedings, be subjected to any form of discrimination on grounds of origin, social, occupational and property status, race, sex, nationality, language, attitude towards religion, convictions, place of residence or any other circumstance (article 6 of the Act on procedures and conditions for holding in custody persons suspected or accused of committing an offence).

71. According to article 24 of Kazakhstan's Code of Criminal Procedure, the court, procurator and person conducting an initial inquiry are required to take all the measures provided for by law in conducting a comprehensive, complete and objective investigation of all the facts needed for the proper elucidation of the case.

72. Kazakhstan's criminal legislation does not directly establish responsibility for torture as a separate offence. However, in article 107, entitled "Brutal or systematic violence", and article 347, entitled "Coercion to testify", the Criminal Code states that the use of torture is an aggravating circumstance.

73. Under article 139 of the Code of Criminal Procedure preventive measures can be adopted if there are sufficient grounds for assuming that a suspect is trying to elude the preliminary inquiry and the courts or hampering an objective investigation and judicial proceedings or that he will continue his criminal activities. Such preventive measures include:

(a) An undertaking to behave in an appropriate manner and not to change his address without permission;

(b) Personal guarantee;

(c) Placing a serviceman under the supervision of the commander of a military unit;

(d) Placing a minor under supervision;

(e) Bail;

(f) House arrest;

(g) Arrest.

74. Article 153 of the Code of Criminal Procedure states that a person may not be held in pre-trial detention for more than two months. If it is impossible to complete the investigation in time and in the absence of grounds for modifying or rescinding a preventive measure of this nature, this period may be extended at the investigator's substantiated request by a district or municipal procurator or military or other procurator at the same level up to three months and by oblast procurators or military or other procurators at the same level up to six months. The extension of this period up to nine months may be ordered by the Deputy Procurator-General or the Chief Military Procurator only if the case proves to be particularly complex, at the substantiated request of the chief of the investigative division and endorsed by the oblast procurator or other procurator at the same level. The period of pre-trial detention constituting a preventive measure may be extended up to 12 months by the Procurator-General of the Republic of Kazakhstan. Further extensions of this period are prohibited and the detained suspect must be released immediately.

75. Chapter 2 of Kazakhstan's Act on procedures and conditions for holding in custody persons suspected or accused of committing an offence deals exclusively with suspects and accused persons, whose rights it guarantees. This Act for the first time set out the various rights

of such persons which were previously not embodied in Kazakhstan's legislation. These rights include: the right to obtain from the administration of the place where a person is being held in custody information about the custodial regime and disciplinary requirements; the right to courteous behaviour on the part of the staff of places of detention; and the right to attend religious services and to possess articles used in religious ceremonies.

76. The Act has also extended the right of suspects and accused persons to visits from relatives and other persons, to receive mail and parcels, and to acquire foodstuffs and basic necessities.

77. Their right to meetings with defence counsel, relatives and other persons is set out in detail in article 17 of the Act, which states that suspects and accused persons, from the moment of their detention, have the right to private and confidential meetings with defence counsel. The number and duration of such meetings is unlimited.

78. Meetings with relatives and other persons are supervised by the staff of the place of detention but are immediately ended if an attempt is made to provide the suspect or accused person with prohibited articles, substances and foodstuffs or information that might hamper the establishment of the facts in criminal proceedings or be used in the commission of an offence.

79. Under article 26 of the Act, accused persons may, in appropriate circumstances, in accordance with the regulations and at their request, be allowed to work in the remand centre and receive appropriate wages after deduction of various items specified by the law.

80. If persons held in a remand centre fail to comply with the rules laid down, the administration of the centre applies the disciplinary measures provided for in article 37 of the Act on procedures and conditions for holding in custody persons suspected or accused of committing an offence: reprimand; placement in a punishment cell or solitary confinement cell for a period of up to seven days. Other restrictions not specified in article 39 of this Act in respect of suspects and accused persons placed in a punishment or solitary confinement cell are not permitted.

81. Grounds for imposition of special measures and the use of force by the staff of the remand centre against suspects and accused persons are described in detail in articles 43 and 44 of the Act. This list and the possible circumstances in which special measures or force may be used against suspects and accused persons in remand centres are exhaustive.

82. The release of suspects and accused persons from remand centres takes place by decision of the investigator, the person conducting an initial inquiry, the procurator or the judge, on the basis of a court order or by decision of the head of the administration of the remand centre when the period of detention laid down by Kazakhstan's legislation comes to an end.

83. Under Kazakhstan's Code of Criminal Procedure, persons who have been convicted by a court have the right to appeal to a court of second instance within a period of 10 days from the time the verdict was handed down; persons who have been convicted and are being held in custody may do so from the day they receive a copy of the verdict. Complaints and protests submitted after this time are not considered. If the time limit laid down is exceeded for

valid reasons, persons entitled to submit a complaint or protest may appeal to the court for reinstatement of the period laid down (articles 399 and 400 of the Code of Criminal Procedure).

Article 8

84. The bilateral agreements dealing with extradition matters concluded by the Republic of Kazakhstan with other States do not contain a list of extraditable offences. The various offences entailing extradition are determined by the nature of the punishment which may be imposed by a court for their commission. As a rule, such punishment is deprivation of liberty for a period of over one year or of a more severe nature.

85. Agreements on judicial assistance and judicial relations in civil, family and criminal proceedings which govern extradition procedures have, for example, been concluded with Uzbekistan, Mongolia, Turkmenistan, Azerbaijan, Lithuania, Georgia, Kyrgyzstan, Turkey, Korea, Pakistan and China. Extradition procedures are also governed by the Minsk Convention of 22 January 1993 of the Commonwealth of Independent States on judicial assistance and judicial relations in civil, family and criminal proceedings. Accordingly, the offences covered by articles 107 and 347 of Kazakhstan's Criminal Code fall under the heading of articles under which offenders may be extradited.

86. So far, there has not been a single case in which the provisions of the above agreements have been applied on the basis of this article, since no request has been ever made for the extradition of a person accused of torture.

87. Should another State party to the Convention against Torture request the extradition of an offender, and in the absence of an agreement with that State, the matter would be settled through the diplomatic channel in accordance with article 8, paragraph 2, of the Convention.

Article 9

88. Article 521 of Kazakhstan's Code of Criminal Procedure states that:

> "Judicial assistance may be provided to the investigating bodies and courts of other States with which the Republic of Kazakhstan has concluded an international judicial assistance agreement, or on the basis of reciprocity, through the procedural action envisaged in this Code, as well as through other procedures for which provision is made in other laws of and international agreements entered into by the Republic of Kazakhstan;
>
> "2. If the provisions of the international agreement ratified by the Republic of Kazakhstan are at variance with those of this Code, the provisions of the international agreement shall be applied;
>
> "3. The expenditure incurred in providing judicial assistance shall be borne by the agency to which the request is addressed in the territory of its State unless otherwise provided in international agreements with the Republic of Kazakhstan."

89. Procedural documents compiled in the territory of the requesting State in accordance with the legislation in force in that territory and bearing the State seal shall be accepted as procedural documents without any restriction unless otherwise provided in the international agreement with the Republic of Kazakhstan.

90. In accordance with article 524 (1) of the Code of Criminal Procedure:

"Instructions to take investigative or judicial action must be drawn up in writing and signed by the official communicating the instructions, bear the seal of the agency and indicate:

"1. The name of the body issuing the instructions;

"2. The name and address of the body to which the instructions are being sent;

"3. The name of the case and nature of the instructions;

"4. Information concerning the persons in respect of whom the instructions are being issued, their citizenship, occupation, place of residence or temporary residence and, in the case of legal persons, their name and address;

"5. An account of the circumstances to be elucidated as well as a list of the documents and the material and other types of evidence requested;

"6. Information about the circumstances in which the offence was committed and its nature and, if necessary, information about the injury caused by the act in question;

"7. Other information needed in order to comply with the instructions."

91. As a rule, the Republic of Kazakhstan assumes the following obligations in concluding an international agreement on criminal matters:

(a) A search for offenders and persons attempting to elude an investigation, the courts or a sentence;

(b) Exchanges of police investigative, reference and criminal information about the preparation of offences and persons participating in such preparations;

(c) The detention and remand in custody of persons to be extradited in connection with the commission of an offence.

92. Article 536 of Kazakhstan's Code of Criminal Procedure states that the instruments used in the commission of the offence as well as articles bearing traces of the offence or acquired in an unlawful manner are also to be handed over when a person is extradited to another State.

93. These articles are handed over on request even if the person in question cannot be extradited because he has died or for other reasons. In order to protect the legitimate rights of third parties, such articles are handed over only when the agency of the other State guarantees their return at the end of the proceedings.

Article 10

94. At the time Kazakhstan ratified the Convention it had no specific education and training programme aimed at preventing use of torture for law enforcement personnel, either civil or military, medical personnel, public officials and other persons. Forensic medical establishments are responsible for determining whether bodily injuries have been caused by torture. However, their work is limited to determining the presence of such injuries and their severity, and not their origin.

95. Kazakhstan's Code of Criminal Procedure, Criminal Code and Code for the Execution of Criminal Penalties set out the procedure to be followed in dealing with persons participating in criminal proceedings and serving sentences in penitentiary establishments. The provisions of these regulatory acts prohibit cruel, inhuman or degrading treatment by members of law enforcement bodies, who are required to act in a courteous manner not only towards participants in criminal proceedings but also persons serving a sentence in the corrective establishments of Kazakhstan. The obligations of the administrative body responsible for the execution of punishment are set out in detail in respect of each form of punishment; incentives and penalties; and the legal position of State bodies and public institutes participating in the execution of criminal penalties (chapter 5-24 of the Code for the Execution of Criminal Penalties).

96. A broader measure of assistance from international institutes and organizations could play an important role in the successful resolution of the problems raised by this article of the Convention.

97. Students studying law at State higher educational establishments as well as students attending the schools of the Ministry of Internal Affairs and studying legal practice, such as detention in custody and the questioning and treatment of persons who have been arrested or detained, are required to study the constitutional rights of citizens and the provisions of the Universal Declaration of Human Rights.

98. All training programmes emphasize the need for the humane and considerate treatment of each individual and to ensure that whatever action is taken is in conformity with the law. These matters are studied in greater depth in courses on criminal law, criminal proceedings, criminology, administrative law and scientific criminal investigation techniques.

Article 11

99. Article 14, paragraphs 5, 6 and 7, of the Code of Criminal Procedure state that no persons participating in criminal proceedings may be subjected to violence or cruel or degrading treatment. No one may be induced to participate in procedural acts likely to endanger the life or health of an individual. The detention of a person who has been arrested as a preventive measure as well as that of a person detained on suspicion of having committed an offence must take

place in conditions that do not endanger his life or health. Consequently, a participant in criminal proceedings may not be subjected to any form of coercion in the course of the investigation except in cases specifically provided for by law (use of special methods, force, etc.).

100. Moreover, the legal status of suspects and accused persons detained in remand centres is governed by Kazakhstan's Act of 30 March 1999 on procedures and conditions for holding in custody persons suspected or accused of committing a crime. Their legal position is defined in chapter 2 of the Act which sets out the rights of persons suspected or accused of committing an offence. Reflecting the provisions of the Convention, the Act sets forth various rights, such as the right to courteous behaviour by the staff of the remand centre, the right to receive letters and parcels, the right to private and confidential meetings with counsel, with representatives of trade unions and other voluntary associations acting as defence counsel, and with relatives and other persons participating in the case as counsel.

101. Particular attention is drawn to the right of suspects and accused persons to their personal safety.

102. Article 18 of the Act states that, in the event of a threat against the life or health of a suspect or accused person or the likelihood of an offence being committed against other suspects or accused persons, the staff of the remand centre are required to take immediate steps to ensure the personal safety of the suspect or accused person at risk.

103. In addition, suspects or accused persons whose rights have been violated in remand centres may submit complaints, applications and proposals in writing or verbally to State bodies, the courts, the procurator, local self-government bodies, voluntary associations and the media. Complaints and applications addressed to a court or procurator are not censured (article 20 of the Act). Improved living conditions have been created for pregnant women and women with children who receive specialized medical care, better food and creature comforts, as required by the Government. They may not be penalized by being placed in a punishment cell (article 29 of the Act).

104. Improved living conditions and better food, as determined by the Government, have similarly been provided for minors suspected or accused of committing an offence. They are also entitled to daily walks (of no less than two hours) and to watch films (circumstances permitting) and television and premises are being equipped for sports purposes (article 30 of the Act).

105. In accordance with Kazakhstan's new Code for the Execution of Criminal Penalties, the rights and freedoms of persons who have been convicted and are serving their sentence in corrective establishments have been extended. In addition to their right to receive mail and printed matter and to listen to the radio, all categories of convicted persons have been granted the right to use the telephone.

106. In accordance with article 12 of the Code for the Execution of Criminal Penalties, convicted persons have been guaranteed the right to practise their religion (virtually all corrective establishments have their own prayer rooms and mosques).

107. Since the entry into force on 1 January 1998 of the new Code for the Execution of Criminal Penalties a distinction has been made between the conditions in which various categories of convicted persons are held (normal, relaxed, rigorous and privileged).

108. Following the entry into force on 1 January 1998 of the new Criminal Code, all categories of convicted persons, depending on the seriousness of their offence, are eligible for parole after serving 1/2, 1/3, 2/3 or 3/4 of their sentence.

109. Various types of penalties such as deprivation of the right to receive mail or printed matter, to listen to the radio and to receive visits, set out in the Corrective Labour Code of the Kazakh SSR, have been abolished.

110. Convicted persons held in privileged conditions may be authorized by the head of the corrective establishment to live in special accommodation under supervision outside the corrective colony.

111. Convicted persons held in a corrective establishment are entitled to 12 working days of paid release from work per year.

112. Convicted persons held in corrective establishments may be authorized to leave their establishment short term, for a period not exceeding seven days for purely personal reasons (the death or serious illness of a close relative), or long term, for the period of annual paid release from work.

113. Depending on their behaviour, convicted juveniles serve their sentences in different conditions, namely, normal, privileged or rigorous (under previous corrective labour legislation, juveniles could live in ordinary lodgings). On the basis of article 130 of the Code for the Execution of Criminal Penalties, the following incentives are now offered to juveniles depending on their conduct, conscientious attitude to their studies, active participation in the activities of amateur organizations and in educational measures:

(a) The right to attend cultural spectacles and sporting events outside the educational colony but accompanied by staff of the colony;

(b) The right to leave the colony accompanied by parents or other close relatives (previous corrective labour legislation did not offer incentives of this nature).

114. The number of privileges that can be granted to convicted juveniles has been increased. They include:

(a) Minors held under relaxed conditions have the right to 12 short and 4 long visits. Long visits with parents can take place outside the colony (under the corrective labour legislation of the Kazakh SSR convicted juveniles were allowed 6 short visits a year; no provision was made for long visits);

(b) They are entitled to receive 12 items of mail or parcels and 12 items of printed matter during the year (under previous legislation they were allowed 6 items of mail or parcels and not more than 2 items of printed matter a year);

(c) Each month they have the right to spend 10 monthly notional accounting units out of their personal accounts for the purchase of foodstuffs and basic necessities (under previous corrective labour legislation they were allowed to spend 7 roubles per month out of their personal account for the purchase of basic necessities and products; convicted juveniles living under improved conditions of detention were allowed to spend an additional 3 roubles a month for this purpose);

(d) Convicted juveniles are guaranteed freedom of conscience and religion. Attendance at religious services is voluntary (previous legislation contained no provision of this kind);

(e) Telephone conversations with relatives are permitted (under previous legislation communication with relatives was by letter);

(f) Juveniles are allowed to leave the re-education colony for strictly personal reasons, accompanied by a relative or another person (under previous legislation they were not allowed to leave the colony);

(g) Under article 129 of the Code for the Execution of Criminal Penalties, convicted juveniles serving a sentence under privileged conditions are allowed to live in lodgings outside the colony without guards; they may also, without any restriction, use money; receive letters, parcels and printed matter; receive short visits. They are entitled to 6 long visits a year, and given the possibility of living outside the colony and wearing civilian clothing and footwear (this privilege was not granted under previous legislation).

115. Under Kazakhstan's Code for the Execution of Criminal Penalties, the main ways in which convicted persons are reformed are through re-educational work; socially useful labour; acquisition of a secondary education; vocational training and public pressure (article 7, paragraph 2, of the Code for the Execution of Criminal Penalties).

Article 12

116. Kazakhstan's legislation states that the purpose of criminal proceedings is the prompt and complete elucidation of a crime, the identification and prosecution of the guilty parties, fair judicial proceedings and the proper application of criminal legislation.

117. Criminal proceedings as defined by law must provide protection against unjustified accusation and conviction and against any restriction of the rights and freedoms of the individual and citizen and, in the event that an innocent person is wrongly accused or convicted, must ensure his immediate and complete rehabilitation; they should also serve to strengthen law and order and the rule of law, prevent crime and inculcate respect for the law.

118. The court, procurator, investigator and person conducting an initial inquiry are required to take all the measures provided for by law with a view to the comprehensive, complete and objective investigation of the circumstances necessary for the proper processing of the case.

119. The Code of Criminal Procedure lays down the procedure to be followed in initiating and conducting criminal proceedings. As has already been noted, the basic principles involved must be strictly complied with since the objective and impartial hearing of a criminal case depends on them as well as on the Office of the Procurator, which monitors criminal proceedings at all stages.

120. In describing the role and position occupied by the Office of the Procurator in the country's system of law enforcement agencies, it may be noted that it is the only body which, in a direct manner, ensures the strict and uniform application of laws, the decrees of the President of the Republic, as well as other laws and regulations in the territory of the Republic. The problem has arisen of finding a legislative solution to the question of vesting the Procurator with procedural rights, not only in respect of criminal prosecution but also conduct of criminal proceedings initiated by the Procurator himself.

121. This problem arises, for example, in the investigation of criminal cases involving the staff of internal affairs bodies and corrective establishments who permitted the violation of the rights and freedoms of citizens. Investigators and the heads of internal affairs bodies having in-house interests at heart and wishing to protect the "honour of the regiment" are at times not interested in bringing a case to its conclusion and in the conviction of the guilty parties by the court. This may happen in a variety of ways, which include superficial inspection of the place of the incident, failure to take proper note of traces of a crime, the destruction of clues and material evidence, intimidation of the victims and forcing them to repudiate their testimony. In such cases, the Procurator, in the absence of conclusive proof, is obliged to agree that proceedings should be dropped.

122. The problem of having the Procurator exercise proper supervision over the legal execution of penalties in the corrective establishments of the Ministry of Internal Affairs arose following the rationalization of government bodies and, on this basis, reductions in February this year in the staff of all nine specialized procurator's offices in oblasts where a large number of establishments were located. At the present time corrective establishments are supervised to the same extent but with fewer staff. Apart from articles 107 and 347 of the Criminal Code, already referred to, officials are often punished under articles referring specifically to the use of torture or systematic or brutal violence, namely, article 106, entitled "Battery", article 307, entitled "Abuse of official functions", article 308, entitled "Action ultra vires", and article 316, entitled "Negligence", of the Criminal Code, as well as article 346, entitled "Deliberate unlawful detention, pre-trial detention or holding in custody". These articles, reflecting the provisions of articles 1 and 12 of the Convention, can be applied, for example, when an official inflicts mental pain or suffering on a victim; alternatively, they can be applied in conjunction with articles 107 and 347 of the Criminal Code.

Article 13

123. Under the Constitution, everyone in the Republic of Kazakhstan has the right to judicial protection of his rights and freedoms. Any person whose rights have been violated or unlawfully restricted is entitled to appeal to State administrative bodies, law enforcement agencies, judicial bodies and the Procurator's Office for the protection of his legitimate rights and freedoms.

124. When a citizen appeals to a law enforcement agency, his applications, complaints and proposals are examined within one month of the day on which they are received; those not requiring additional consideration and verification are considered without delay, and within 15 days at the most.

125. In cases where an application or complaint requires special verification, entails requests for additional information or the adoption of other measures, the time limit for their consideration may be extended by the head of the internal affairs agency or his deputy but not for more than one month, and the person submitting the application or complaint is notified accordingly.

126. Under article 10 of the Code for the Execution of Criminal Penalties, convicted persons have the right to submit oral and written proposals, applications and complaints to the administration of the establishment or agency executing the penalty, to the higher administrative bodies of establishments and agencies executing the penalty, to a court, the subordinate bodies of the Procurator's Office, other State bodies, voluntary associations, and to international organizations responsible for the protection of human rights and freedoms.

127. In accordance with article 99 of the Code of Criminal Procedure, the body in charge of criminal proceedings is required to take steps to ensure the safety of the persons involved, such as the victims, witnesses, the accused, as well as other persons and members of their families if there is a real danger that they might be subjected to violence or other acts prohibited by criminal legislation. The body in charge of the proceedings is required to take steps to ensure the safety of the above persons on the basis of their oral (written) declaration or its own initiative, and accordingly makes the necessary arrangements.

128. In accordance with article 100 of the Code of Criminal Procedure, the following procedural measures are taken to ensure the safety of witnesses, suspects, persons accused and other persons involved in criminal proceedings, the members of their families and close relatives:

(a) The issuance by the body in charge of the criminal proceedings of an official warning to the person threatening to do violence or engage in other acts prohibited by criminal legislation that he could be held criminally responsible for such acts;

(b) Restriction of access to information about a protected person;

(c) Measures ensuring his personal safety;

(d) The adoption of preventive measures in respect of the accused (suspect) precluding the possibility of his using (preparing to use) violence against persons involved in the criminal proceedings or engaging (making preparations to engage) in other criminal acts.

129. In order to ensure the safety of persons involved in criminal proceedings, the person in charge of them may hold closed court hearings. He is entitled to forbid the use of video or sound recordings as well as other means of recording cross-examinations and have the accused and defence counsel removed from the courtroom.

Article 14

130. Under Kazakhstan's criminal procedure legislation, a person acquitted by a court, as well as an accused person (suspect) in respect of whom the criminal investigation body has decided to drop criminal proceedings on the basis of evidence precluding criminal prosecution, is regarded as innocent and his rights and freedoms guaranteed by the Constitution cannot in any way be restricted.

131. The court and criminal prosecution bodies are required to take all the measures laid down by law to rehabilitate such persons and to provide compensation for any injury caused as a result of unlawful acts by the body in charge of the criminal proceedings (article 39 of the Code of Criminal Procedure).

132. The injury caused to a person as a result of unlawful detention, arrest, house arrest, temporary absence from his job, placement in a special medical establishment, conviction and the use of coercive measures of a medical nature is compensated in full from the State budget, regardless of the fault committed by the body in charge of the criminal proceedings (article 40 (1) of the Code of Criminal Procedure).

133. Once the body in charge of the criminal proceedings has adopted a decision to rehabilitate the person in question it is required to make an official apology for the injury he suffered (article 44 of the Code of Criminal Procedure).

134. In the event of the death of the person concerned, the right to compensation in accordance with established procedure passes to his successor and, in the case of pensions and allowances whose payment was suspended, to those members of his family comprising the group of persons entitled to benefits in the event of the breadwinner's death (article 40 (3) of the Code of Criminal Procedure).

135. The persons mentioned in article 40 (2) and (3) of the Code of Criminal Procedure are entitled to full compensation for material damages and moral injuries, and to the restoration of employment, pension, housing and other rights. If the rehabilitation or compensation requirement is not complied with or if the person is not satisfied with the decision adopted, he is entitled to appeal to a court in accordance with the procedure prescribed by civil law (article 47 of the Code of Criminal Procedure).

Article 15

136. Paragraph 3 (9) of article 77 of the Constitution states that "evidence obtained by illegal means shall have no juridical force. No person may be sentenced on the basis of his own admission of guilt".

137. No person involved in a criminal proceeding may be subjected to coercion or brutal or degrading treatment (article 14 (5) of the Code of Criminal Procedure).

138. Kazakhstan's Criminal Code states that the coercion of a suspect, accused person, victim or witness to give testimony or of an expert to present his conclusions by means of threats, blackmail or other unlawful acts on the part of the investigator or person conducting the initial inquiry and accompanied by the use of force, bullying or torture is punishable by deprivation of liberty for a period of from three to eight years.

139. Evidence obtained in violation of the law is therefore regarded as being legally invalid and cannot be used as a basis for prosecution or as proof in any other connection.

140. Factual information obtained by means of the violations referred to in the first part of this article may be used as evidence of the violations committed by and the culpability of the persons who acquiesced in them (article 116 of the Code of Criminal Procedure).

Article 16

141. Kazakhstan's legislation states that members of law enforcement agencies who subject persons involved in criminal proceedings to torture with a view to obtaining evidence shall be held responsible for their acts. The corresponding provisions in the Criminal Code are article 107, entitled "Coercion", and article 347, entitled "Coercion to obtain evidence".

142. The provisions of Kazakhstan's Criminal Code under which persons are held criminally responsible for the use of other forms of cruel, inhuman or degrading treatment or punishment are contained in articles 125, entitled "Abduction", punishable by deprivation of liberty for a period of from 10 to 15 years, with or without confiscation of property; 126, entitled "Illegal deprivation of liberty", punishable by deprivation of liberty for a period of from 5 to 10 years, with or without confiscation of property; 127, entitled "Unlawful placement in a psychiatric institution", punishable by deprivation of liberty for a period of from 3 to 7 years, with or without deprivation of the right to occupy certain positions or engage in certain activities for a period of up to 3 years; and 307, entitled "Abuse of official functions", punishable by deprivation of liberty for a period of up to 8 years and deprivation of the right to occupy certain positions or engage in certain activities for a period of up to 3 years.

143. In accordance with article 106, entitled "Battery", of the Criminal Code, battery or other violent acts inflicting physical pain but not having any after-effects covered by article 105 of this Code are punishable by a fine in the amount of up to 100 notional accounting units or salary or other income of the person convicted for a period of up to one month, by the performance of social work for up to 180 hours or corrective work for up to six months, or by detention for one month.

144. Based on the interpretation of the Commentary, battery consists in inflicting repeated blows with the fists, feet or hard blunt instruments on the body of the victim, thereby causing him physical suffering but not damaging the anatomical integrity of tissues and the normal functioning of organs, but causing minor health disorders lasting a short time (not more than six days). Other violent acts causing physical pain are interpreted as anything inflicted on the victim's body, apart from blows and battery, such as pinching, cutting, twisting of the hands, the tearing out of hair and the use of biological agents. In such cases the members of law enforcement agencies are held responsible, regardless of whether they personally committed the offence or were accomplices.

III. INFORMATION ABOUT SPECIFIC CASES

145. A review of cases of the violation of the constitutional rights and freedoms of citizens during the period under consideration revealed that a large number of such violations involving brutal and other unlawful forms of treatment and punishment had occurred. Specific typical violations of the provisions of the Convention against Torture that occurred in the Republic of Kazakhstan are described below.

146. On 15 February 1999 the Procurator of the Ayaguz district of East Kazakhstan oblast instituted criminal proceedings against S. Tashmetov, a member of the staff of the municipal Internal Affairs Department's Detention Centre who, exceeding his official powers and without any justification, placed the juvenile M. Otelenov in the Detention Centre where he inflicted minor physical injuries on him. On 7 April 1999 the Ayaguz district court sentenced S. Tashmetov to two years' deprivation of liberty - one of which was suspended - under article 63 of the Criminal Code.

147. On 29 September 1999 a court found I. Erdibek and A. Novruz, Chief and detective officer respectively of the criminal investigation division of the municipal Internal Affairs Department of the town of Zhanaozen, Mangistaus oblast, guilty under article 308 (1) and article 347 (2) of the Criminal Code. On 4 May they had taken B. Esenamanov to the municipal Internal Affairs Department and, without completing a detention deposition, unlawfully detained him in its offices for a period of two days and by violent means got him to confess that he had committed theft.

148. On 10 June 1999, the procurator of the Kurchum district of East Kazakhstan oblast instituted criminal proceedings under articles 308 (1) and 347 (2) of the Criminal Code against E. Okasov, first deputy chief of the Kurchum district Internal Affairs Department who, on 7 June 1999, acted ultra vires in the course of questioning the suspect M. Kaliev, using physical violence and, in order to obtain a confession, searing his body with a metal object.

149. Criminal proceedings were instituted under article 308 (1) of the Criminal Code against B. Tazhibaev, head of unit, and A. Shyganakov, detective officer, attached to the UG-157/9 bureau of the corrective system administration of the Internal Affairs Department of Atyrao oblast who, on 26 February 1999, acted ultra vires and beat K. Kunbaev, M. Sariev, T. Zharmagambetov, T. Niyazgaliev and A. Ospanov with clubs because they refused to strip. These persons suffered bodily injuries of various kinds as a result of their beating. By way of

protesting against these unlawful acts, 28 convicts performed acts of self-mutilation, cutting their abdominal cavities with razor blades. A. Shyganakov and B. Tazhibaev were given a suspended sentence of two years' deprivation of liberty. On the order of the head of the Internal Affairs Department the two staff members were dismissed from their posts. This unusual incident was looked into by the procurators of the oblast with the participation of the Procurator-General of the Republic of Kazakhstan and as a result the chief of the establishment was dismissed.

150. The following case, which was given broad coverage by the media, is one of several that are receiving close attention by the country's law enforcement bodies.

151. The investigative department of the National Security Committee of Kazakhstan in the town of Astana investigated a criminal case with a view to bringing charges against K.G. Temirov, head of the criminal investigation division of the Almaty Internal Affairs Department of Astana; S.K. Seilov, deputy chief of the criminal investigation division of the Astana Internal Affairs Department; B.A. Sapargaliev, senior detective officer of the bureau for the investigation of offences against the individual (criminal investigation division of the health control unit of the Astana Internal Affairs Department); A.T. Dosmukhanov and G.E. Shukeev, detective officers of the criminal investigation division of the Almaty Internal Affairs Department of the town of Astana; T.R. Shalbaev, detective officer of the criminal investigation division of the Astana Internal Affairs Department; and N.N. Salybekov, inspector attached to the juvenile affairs inspectorate of the Almaty Internal Affairs Department of Astana, for having committed offences covered by articles 308 (Action ultra vires), 346 (Deliberate unlawful detention, pre-trial detention or holding in custody) and 347 (Coercion to obtain testimony) of the Criminal Code.

152. It was established in the course of the preliminary investigation that on 31 May 1998, V.N. Zemblevsky, who was being held in custody in an Internal Affairs Department holding facility for committing minor administrative offences, was taken to the Astana district Internal Affairs Department where Seilov, Temirov and Sapargaliev, without sufficient justification, said they suspected him of killing Krivtsov and demanded that he confess to the crime. When he refused, Temirov and Sapargaliev, acting on the orders of Seilov, handcuffed and gagged him and began to beat him with their fists and a stick. Later on, Zemblevsky was beaten up on a number of occasions by Temirov and Shalaev. During the night of 3 June 1998, Salybekov, a student from the Aqmola law school who had been sent for training with the Almaty district Internal Affairs Department, acting on the orders of the staff of the criminal investigation division, went to where Zemblevsky was being held and did not allow him to sleep, making him stand on one foot for long periods of time and, when he became tired, beat him. As a result of these unlawful acts on the part of members of the police, Zemblevsky suffered extensive bodily injuries.

153. In June 1998, in the course of investigations aimed at elucidating the murder of A. Bekov, Mr. and Mrs. Gilfanov, who were neighbours of the victim, were unlawfully arrested and detained in the premises of the Almaty district Internal Affairs Department. Seeking a confession, the police officers, after threatening to use violence against them and members of their families, beat them up. Mrs. Gilfanov was also subjected to sexual taunts.

154. Furthermore, on 14 June 1998, Shukeev and Temirov beat up Yusupov, who was suspected of assault with intent to rob, in the premises of the Almaty district Internal Affairs Department.

155. The Almaty District Court in the town of Astana, after hearing the criminal case in open court, found the following guilty:

(a) K.G. Temirbekov, of committing offences covered by articles 308 (1), 347 (2) and 346 (1), and sentenced him to four years' deprivation of liberty;

(b) S.K. Seilov, of committing offences covered by articles 308 (1), 347 (2) and 346 (1), and sentenced him to three years and six months' deprivation of liberty;

(c) B.A. Sapargaliev, A.T. Dosmukhanov and G.E. Shukeev, of committing offences covered by articles 308 (1) and 347 (2), and sentenced them all to three years and six months' deprivation of liberty;

(d) T.R. Shalbaev, of committing offences covered by article 308 (1), and sentenced him to one year's deprivation of liberty; he was not required to serve his sentence as a result of an amnesty act;

(e) N.N. Sadybekov, of committing offences covered by article 107 (2 (a)) (Coercion), and sentenced him to three years' deprivation of liberty with a probationary period after one year. He was not required to serve his sentence as a result of an amnesty act.

A paper on the harmonization of Kazakhstan's legislation with the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, prepared by Mr. Bill Bowring (United Kingdom) (expert, Joint Office for Democratic Institutions and Human Rights/European Commission Programme for Advancing Human Rights and Democratization in Central Asia) is appended to the present report. Mr. Bill Bowring was invited by the Human Rights Commission attached to the Office of the President of the Republic of Kazakhstan to provide methodological assistance in the preparation of the report.

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COMMITTEE AGAINST TORTURE

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION

Initial reports of States parties due in 1999

Addendum

ZAMBIA

[1 December 2000]

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Introduction

1. The Republic of Zambia acceded to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 5 November 1998. The instrument of accession was deposited on 7 October 1998 and the Convention entered into force for Zambia on 6 November 1998. In accordance with article 19, Zambia's initial report fell due for submission to the Committee against Torture on 6 November 1999.

2. The Government of Zambia, through the Ministry of Legal Affairs, constituted an Inter-Ministerial Reporting Committee to undertake the task of preparing and producing Zambia's initial report. The Inter-Ministerial Committee drew its membership from relevant line ministries and government departments, quasi-governmental institutions, non-governmental organizations (NGOs) and the University of Zambia.

3. The entire drafting process was made possible with the assistance of the Government of Sweden through a grant made to the Government of Zambia specifically to assist Zambia meet its reporting obligations under the Convention. Zambia also received technical assistance from the Raoul Wallenberg Institute for Human Rights and Humanitarian Law of the University of Lund in Sweden, which sent a representative to the Induction Workshop and the National Review Symposium referred to below.

4. The reporting process began with a five-day Induction Workshop under the guidance of Professor Bent Sorensen, a founder member of the Committee against Torture. Professor Sorensen discussed the drafting guidelines for the Convention with the participants. At the end of the Workshop, participants prepared a skeleton report which formed the basis for further drafting work.

5. The Induction Workshop was followed by four provincial workshops coordinated from the Ministry of Legal Affairs. The purpose was to collect information from the provinces on the situation of torture and cruel, inhuman or degrading treatment or punishment. Reports on each workshop were produced and the information incorporated in a draft prepared following a five-day drafting session. A one-day National Review Symposium then followed, bringing together stakeholders to consider the draft report. The Symposium also benefited from Professor Sorensen's observations. (See annex 6 for workshop dates.)

6. Zambia has not made declarations under articles 21 and 22 recognizing the competence of the Committee to receive and consider communications from States and individuals, respectively.

7. Writing the report gave the Zambian authorities the opportunity to take stock of the domestic legislative, administrative and judicial situations regarding torture. By doing this, the State realized that by introducing torture - as defined in article 1 of the Convention - as a specific crime in the domestic legislation and with the appropriate penalties, the possibility for Zambia to respect nearly all the provisions enshrined in the Convention would be considerably enhanced. Initiatives in this direction have been taken.

I. GENERAL INFORMATION

8. Zambia has a dualistic legal regime implying that international instruments ratified or acceded to are not self-executing at domestic level and require enabling legislation to be enforceable. Incorporation of international instruments to which Zambia is party is done by either passing regulations under already existing legislation or passing a whole new piece of legislation. The Convention against Torture has not yet been incorporated by either of the methods outlined except for the prohibition of torture under article 15 of the Zambian Constitution which provides that: "A person shall not be subjected to torture, or to inhuman or degrading punishment or other like treatment". The article forms part of the Bill of Rights of the Zambian Constitution and is non-derogable under any circumstances. In Zambia victims of torture are able to seek redress under article 28 of the Constitution by petitioning the High Court of a declaratory judgement and damages.

9. Acts of Torture as defined in article 1 of the Convention against Torture have not been criminalized under Zambia's Penal Code as required by article 4 of the Convention.

10. The following Acts contain provisions tailored to prevent and eliminate the cruel, inhuman and degrading treatment or punishment of prisoners and suspects held under the custody of the State:

(a) The Zambia Police (Amendment) Act (No. 14 of 1999) provides measures that operate to protect and monitor persons in police custody. Custody officers are designated to be directly responsible for the welfare of detainees;

(b) The Prisons Act (Cap. 97 of 1966) safeguards the welfare of prisoners by providing for the management and control of prisons and prisoners. This Act contains regulations that protect prisoners from cruel, inhuman and degrading treatment in matters such as hygiene, sanitation, diet, space and medical attention;

(c) The Refugees (Control) Act (Cap. 120) guarantees the protection of refugees from refoulement.

11. Zambia has ratified and/or acceded to all the other five major international instruments relating to human rights which have been negotiated and adopted under the auspices of the United Nations. These are: the International Covenant on Civil and Political Rights acceded to in April 1984; the International Covenant on Economic, Social and Cultural Rights, acceded to in April 1984; the International Convention on the Elimination of All Forms of Racial Discrimination, ratified in 1972; the International Convention on the Elimination of all Forms of Discrimination against Women, ratified in 1985, and the Convention on the Rights of the Child, ratified in 1995. In addition, Zambia is a State party to: the African Charter on Human and Peoples' Rights, ratified in 1986; the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, ratified in 1973; the 1951 Convention relating to the Status of Refugees; the 1967 Protocol relating to the Status of Refugees; the four Geneva Conventions of 1949, acceded to on 19 October, 1966, and the 1977 Protocols to the Geneva Conventions; and all seven fundamental conventions of the International Labour Organization.

Judicial measures

12. The competent authorities that have jurisdiction over matters dealt with in the Convention are: The Supreme Court of Zambia established under article 92 of the Zambian Constitution of 1991 (as amended in 1996) (hereinafter called the Constitution) and governed by the Supreme Court of Zambia Act (Cap. 25, 1973); the High Court of Zambia established under article 94 of the Constitution and governed by the High Court Act (Cap. 27, 1960) and the subordinate courts established under article 91 (1) (d) of the Constitution and that are governed by the Subordinate Courts Act (Cap. 28, 1934).

Administrative measures

13. The administrative authorities that have jurisdiction over matters dealt with in the Convention include the Human Rights Commission established under article 125 (1) of the Constitution of Zambia and governed by the Human Rights Commission Act (No. 39 of 1996). The other competent authorities are: the Commission for Investigations established under the Commission for Investigations Act (Cap. 39); the Drug Enforcement Commission established under the Narcotic and Psychotropic Substances Act (Cap. 96); the Anti-Corruption Commission established under the Anti-Corruption Commission Act (No. 42 of 1996); the Immigration Department established under the Immigration and Deportation Act (Cap. 123) and the Police Public Complaints Authority established under the Zambia Police (Amendment) Act (No. 14 of 1999).

II. PRACTICAL IMPLEMENTATION OF THE CONVENTION

Factors and difficulties

14. Under Zambian law the Constitution, while prohibiting torture under article 15, does not define what amounts to torture, thereby creating interpretation problems. This situation makes it possible for certain acts of torture to go on unchecked. The absence of a definition of torture in the Constitution and the non-criminalization of acts of torture have made it difficult for law enforcers to charge perpetrators accordingly.

15. There are no specific rules and instructions issued on the prohibition of torture with regard to the duties and functions of law enforcement officers. Law enforcement institutions lack capacity for the training of law enforcement officers with regard to the prohibition of torture due to lack of financial and human resources.

16. There is further a lack of financial resources to conduct systematic reviews of interrogation rules, methods and practices. There are no facilities within law enforcement institutions that enable prompt and impartial investigations. Most remote areas where these institutions are based lack communication facilities. Further, these institutions do not have communication facilities for the purpose of notifying other States of cases that affect their nationals. There is generally a lack of awareness of human rights and the provisions of the Convention amongst Zambians. As a result of this, Zambians find themselves vulnerable to abuse that is caused by law enforcement officers not schooled in the observance of fundamental rights and freedoms.

17. While Zambia has an Extradition Act, the Act does not list torture as an extraditable crime in the first schedule, making it difficult for the State to either pursue a perpetrator who has fled the country or effectively cooperate with a State pursuing a perpetrator as stipulated in the Convention against Torture.

18. The Immigration and Deportation Act (Cap. 123), which is the principal legislation in matters of expulsion of aliens, does not preclude the State from expelling a person to a country where he is likely to be tortured.

19. The Refugees (Control) Act (Cap. 120) does not contain a definition of the term "refugee". In practice, the definitions of "refugee" as contained in the 1951 Convention relating to the Status of Refugees and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa are used. However, it is noted that said definitions do not expressly provide for torture as a ground for determination of refugee status.

20. Though the mandate of the Human Rights Commission as provided in the Act includes investigating complaints such as torture, its findings lead to mere recommendations, which have no legal coercive effect. This notwithstanding, Government and its agents are expected to act upon the recommendations. This, too, is the position regarding the Police Public Complainants Authority, which is only allowed to make recommendations to be acted upon by Government.

Article 2

Legislative measures

21. Article 15 of the Constitution, which prohibits torture, is non-derogable. The substantive provision has no exceptions or limitations to it and, under article 25 of the Constitution, it is not included among the provisions in the Constitutional Bill of Rights against which measures may be taken to limit the enjoyment of the rights contained therein in time of war or when a state of public emergency declared by the President under article 30 is in force. (See paragraph 88 for the wording of article 25 of the Constitution.) At the moment, no state of war or threat of war, internal political instability or public emergency exists in Zambia.

22. With regard to superior orders, the practice in Zambia is that junior officers must obey orders. It is practically difficult for a junior officer to disobey an order from a superior officer as he/she may risk disciplinary action being taken against him/her.

23. Under article 28 of the Constitution, a person who has been a victim of torture may petition the High Court of Zambia for redress. Article 28 of the Constitution reads in part:

> " ... if any person alleges that any of the provisions of articles 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court which shall hear and determine any such application ...".

24. Further, a victim of torture can directly sue the Attorney-General, being the principal legal adviser to Government, for damages. Torture does not exist as an offence under the Zambian Penal Code (Cap. 87). As a consequence of this no one can be prosecuted for the crime of torture.

25. Because of the dualistic approach adopted by Zambia in the implementation of international treaties and conventions, the provisions contained in the Convention cannot be enforced in the domestic courts unless the Convention is domesticated and incorporated into national legislation.

Judicial measures

26. The Judicature of the Republic of Zambia is established by article 91 of the Constitution of Zambia and consists of, inter alia: the Supreme Court of Zambia; the High Court of Zambia; the subordinate courts; and the local courts.

27. As mentioned above, cases of torture in Zambia are dealt with by the High Court by way of petition under article 28 (1) of the Constitution while appeals lie with the Supreme Court.

28. Although the Constitution does not define torture, the courts have tried to define what they consider to be torture. The case of Maybin Phiri and another vs the Attorney-General is instructive. In this case Justice Chitengi defined torture as: "pain cruelly inflicted, ... being sjamboked, stripped naked, put on a swing while his arms and legs are handcuffed, blindfolded and electrocuted".

29. The Zambia courts have endeavoured to take effective measures to prevent torture. The case of Dave Kataba Wanieke and the Attorney-General (1999/HP/563 is instructive. In this case Justice Chulu stated, inter alia,

> "... The photograph which was taken of the applicant tells a story of what sort of physical treatment he went through at the hands of the police officers. There are visible scars of wounds and marks inflicted on him ... I find as a fact that the applicant was physically assaulted by the servants of the State as pleaded by the applicant. Indeed, as there is no law that authorizes police officers to inflict any assault on suspects while detained for investigations, the court views such acts very seriously as they are not only unlawful but a violation of article 15 of the Constitution."

30. However, it is important to note that the limited number of cases presented before the Court regarding torture is due to the fact that torture has not been criminalized under the Zambian Penal Code. As a consequence of this, the courts, when determining matters under article 15 of the Constitution, always give the definition of torture a wider application in order to capture as many instances as possible under the ambit of torture.

Administrative measures

31. In terms of administrative measures, the Convention has been given effect through the establishment of the Human Rights Commission and the Police Public Complaints Authority.

Human Rights Commission

32. The Zambian Constitution establishes under article 125 an autonomous Human Rights Commission. Article 125 provides:

"1. There is hereby established the Human Rights Commission.

"2. The Human Rights Commission shall be autonomous."

33. The functions and powers of the Human Rights Commission are outlined in the Human Rights Act (No. 39 of 1996). The functions of the Commission under section 9 are to:

(a) Investigate human rights abuses;

(b) Investigate any maladministration of justice;

(c) Propose effective measures to prevent human rights abuse;

(d) Visit prisons and places of detention or related facilities with a view to assessing and inspecting conditions of persons held in such places and make recommendations to redress existing problems;

(e) Establish a continuing programme of research, education, information and rehabilitation of victims of human rights abuse to enhance the respect for and protection of human rights; and

(f) Do ail such things as are incidental or conducive to the attainment of the functions of the Commission.

34. The powers of the Commission under section 10 are to investigate any human rights, abuses either on its own volition or on receipt of a complaint or allegation by:

(a) An aggrieved person acting in such person's own interest;

(b) An association acting in the interest of its members;

(c) A person acting on behalf of an aggrieved person; or,

(d) A person acting on behalf of and in the interest of a group or class of persons.

35. The Human Rights Commission recommends to the appropriate authorities the measures to be taken to remedy the infringement of a right. This mechanism has been used in cases of torture.

36. Using its mandate, following complains of torture by suspects in the failed coup d'état of 1997, the Commission visited the places of detention and held interviews with the detainees. On 30 March 1998, after the completion of investigations the Commission in its report to Government made certain recommendations regarding the treatment of detainees and also on possible ways of improving the justice delivery system.

37. Acting on the Commission's recommendations, the President of the Republic of Zambia, using the provisions of the Inquiries Act (Cap. 41), appointed a Commission of Inquiry by way of Statutory Instrument No. 94 of 1998 to further investigate the allegations of torture made by detainees against members of the Police Service and other law enforcement agencies. The commission has since presented its findings to Government.

38. The Human Rights Commission is only active at national level and not at the provincial or district level due to operational budgetary constraints.

Police Public Complaints Authority

39. Following numerous complaints by members of the public against the conduct of some police officers, the State has amended the Zambia Police Act (Cap. 107) to provide for the establishment of a Police Public Complaints Authority. The Authority, established under the Zambia Police (Amendment) Act, is tasked to perform the following functions:

(a) To receive all complaints against police actions;

(b) To investigate all complaints against police actions which result in serious injury or death of a person;

(c) To submit its findings, recommendations and directions to:

(i) The Director of Public Prosecutions for consideration of possible criminal prosecution;

(ii) The Inspector General for disciplinary action or other administrative action; or

(iii) The Anti-Corruption Commission or any other relevant body or authority.

40. The Police Public Complaints Authority has the power to investigate all complaints referred to it by:

(a) An aggrieved person directly affected by police action;

(b) An association acting in the interests of its members; and

(c) A person acting on behalf of an aggrieved person, body or organization.

41. According to section 57 C of the Zambia Police (Amendment) Act cited above, the Authority shall consist of five part-time members appointed by the Minister. The Chairperson shall be a person who has held or is qualified to hold the office of judge of the High Court. The members shall hold office for a period of three years and may be reappointed for a further like period.

42. The Police Public Complaints Authority, though provided for by law, is yet to be constituted. The Government will appoint the members soon.

Other measures

43. The Penal Code (Cap. 87), which is the principal piece of legislation containing criminal offences, does not include a definition of torture or a schedule of deterrent penalties for the perpetrators of torture. This causes difficulty because, apart from redress availed under article 28 (1) of the Constitution, redress is only afforded through the following provisions of the Penal Code:

(a) Section 229: "Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for seven years.";

(b) Section 230: "Any person who unlawfully, and with intent to do any harm to another, puts any explosive substance in any place whatever, is guilty of a felony and is liable to imprisonment for 14 years.";

(c) Section 231: "Any person who unlawfully, and with intent to injure or annoy another, causes any poison or other noxious thing to be administered to, or taken by, any person, and thereby endangers his life, or does him some grievous harm, is guilty of a felony and is liable to imprisonment for 14 years.";

(d) Section 247: "Any person who unlawfully assaults another is guilty of a misdemeanour and, if the assault is not committed in circumstances for which a greater punishment is provided in this Code, is liable to imprisonment for one year.";

(e) Section 248: "Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years."

44. In the foregoing provisions, the term "any person" includes both private persons and public officials or persons acting in an official capacity.

Factors and difficulties

45. The establishment of an impartial and autonomous Human Rights Commission by Government, while meant to provide protection to the citizenry, is hampered by the following factors and difficulties:

(a) The Commission lacks institutional capacity at national, provincial and district levels to effectively carry out its mandate. This includes the absence of permanent established offices and staff at provincial and district levels, no logistical support and insufficient trained human resources in human rights matters;

(b) Low levels of human rights awareness on the part of the citizenry has led to the non-prosecution of torture cases by victims;

(c) Lack of adequate cooperation between Human Rights Committees, established by the Commission at provincial level, and law enforcement agencies has undermined the effective execution of the Commission's mandate at both provincial and district levels.

Article 3

Legislative measures

46. The Constitution of Zambia does not recognize one's right to seek asylum. Nor does the Constitution or other subsidiary legislation provide expressly for the principle of non-refoulement. Zambia is, however, a party to the 1951 Refugee Convention and the 1967 Protocol though their provisions have not been incorporated into domestic legislation.

47. The principle of non-refoulement is implied under section 10 of the Refugees Control Act (Cap. 120), which provides that: "No deportation shall be effected against a refugee who has been resident in Zambia continuously for a period of three months if the Minister or the Court is of the opinion that the refugee is likely to be subjected to physical attack."

48. The above is augmented by section 11 of the said Act, which further prohibits the refoulement of asylum-seekers by providing that: "No authorized officer shall refuse without reason to issue a refugee with a permit to remain in Zambia if the officer has reason to believe that he is likely to be tried or detained or restricted or punished without trial or subject to physical attack in the territory where he is likely to be subject to a physical attack."

49. Though the foregoing provision refers only to subjection to a physical attack, the National Eligibility Committee does in practice take into account mental torture, e.g. vigorous interrogations that may cause mental anguish to the asylum-seeker.

50. The Immigration and Deportation Act (Cap. 123) does not recognize the particular status of asylum-seekers or refugees and consequently treats them as ordinary aliens and, when confronted, they are dealt with as such. There are no provisions prohibiting refoulement in the Immigration and Deportation Act.

51. With regard to the Extradition Act (Cap. 94), the Attorney-General will not extradite persons who are believed to have committed political offences and thus likely to be tortured upon return to their respective countries. There is no provision in the Extradition Act to extradite persons who have committed the offence of torture.

52. Whilst the Refugees (Control) Act provides limited safeguards for the principle of non-refoulement, the Immigration and Deportation Act on the other hand does not appear to apply the same standard. This apparent discrepancy illustrates the lack of harmonization of the Acts and the lack of collaboration between the officials tasked with asylum-seekers and refugees issues. Therefore, asylum-seekers and refugees risk being refouled.

Judicial measures

53. There are no judicial measures to report on during this period.

Administrative measures

54. Government has constituted a National Eligibility Committee whose prime purpose is to determine refugee status. This Committee is under the Office of the Commissioner for Refugees, a section within the Ministry of Home Affairs.

55. The National Eligibility Committee ensures that asylum-seekers have access to the Individual Refugee Status Determination Committee that applies the criteria contained in the 1951 Convention and the 1969 OAU Convention. Regarding large group influxes, the same have access to Provincial Joint Operations Committees that, among other duties, have been delegated with the responsibility of determining refugee status based on the criteria contained in the OAU Convention.

56. The practice of having asylum-seekers have access to the refugee status eligibility procedures reduces the chances of arbitrary rejections of applications for refugee status and reduce chances of refoulement. Secondly, no application will be rejected if it appears that such a decision will result in the applicant being returned to a country where he/she is likely to be tortured.

57. In the event of a rejection, an applicant has the right to appeal against the decision although this is not legally provided for in the Refugees (Control) Act. In practice, asylum-seekers do appeal against a rejection. At present, there is no time limit within which to lodge an appeal. The effect of the appeal is that an applicant will be allowed to remain until the determination of the matter. The appeals are made to the Office of the Commissioner for Refugees who then refers such cases to the National Eligibility Committee for a review of the decision.

58. When considering claims for asylum, Zambia's legislative, judicial and administrative measures take into account other relevant considerations, where applicable, such as the existence of a consistent pattern of gross flagrant or mass violations of human rights.

Factors and difficulties

59. The following are the factors and difficulties affecting the realization of this article:

(a) Members of the National Eligibility Committee are only exposed to ad hoc general administrative training, which is inadequate. The training that is conducted in this regard is by the Government and the Office of the United Nations High Commissioner for Refugees (UNHCR). There is no appeal system against a decision of the National Eligibility Committee to a judicial tribunal or body;

(b) Sometimes it is difficult to determine genuine asylum-seekers, especially where they emanate from countries which do not share a border with Zambia and/or where they enter Zambia through unofficial entry points. Such persons may be detained or kept in safe custody. It is easier to determine the status of persons fleeing from neighbouring countries because the authorities are usually familiar with the situation in the neighbouring State that may justify refugee status. In situations where it is conclusive that a person is a genuine refugee he or she may be put on reporting orders while the authorities determine his or her case;

(c) The Immigration and Deportation Act does not contain or define the term "refugee". All asylum-seekers are therefore dealt with individually and may require to be put in safe custody.

Other measures

60. There are no other measures to report on.

Article 4

61. In Zambia "torture" is not provided for as a specific offence under the Penal Code. Neither is an attempt to commit torture and/or an act by any person which constitutes complicity or participation in torture.

62. Zambia does not have any penalties in the Penal Code for the offence of torture, an attempt to commit torture and/or complicity or participation in torture.

Article 5

63. There is no specific legislation enabling Zambia to establish jurisdiction in cases of torture committed or attempted aboard a ship or aircraft registered in Zambia.

64. There are no issues that have come up for judicial determination in the courts of Zambia. However, article 15 of the Constitution of Zambia prohibits any acts of torture. Therefore, if torture is committed within territory under the jurisdiction of Zambia, the High Court has jurisdiction under article 28 (1) of the Constitution to hear a petition. The redress available is a declaratory judgement and, in addition, the Court may award damages.

Article 6

65. As pointed out earlier, torture per se is not a crime in Zambia. It would therefore be difficult to detain and prosecute a person on the basis that he or she has committed torture. However, if the act or omission falls within the definition of one of more of the offences in sections 229, 230, 323, 247 and 248 of the Penal Code referred to above, the appropriate authorities have jurisdiction to inquire into the facts and may arrest and detain the suspected offender for possible prosecution.

Article 7

66. Torture is not an offence in the Zambian Penal Code. Therefore, the competent Zambian authorities cannot deal with any cases under this article.

67. Extradition is governed by the Extradition Act (Cap. 94, 1968). Under section 2 (1) of the Act an extraditable offence is defined as:

> "(a) an offence against the law of any foreign country for which extradition may be sought from the Republic under any extradition agreement or under any reciprocal facilities; or
>
> "(b) an offence that is described in the first schedule and for which extradition may be granted to a declared commonwealth country pursuant to Part III."

68. The First Schedule of offences in the Extradition Act does not contain the offence of torture. In addition, Zambia has not entered into any extradition treaties with other countries in relation to the offence of torture. In light of the foregoing, no one can be prosecuted for the offence contained in article 4.

69. The preparation of this report has revealed the gaps in the law with respect to torture and clearly demonstrated the need for the Government of Zambia to undertake legislative reform in order to ensure that Zambia complies with the terms of the Convention. Initiatives in this direction are being undertaken.

Article 8

70. Since torture is not a criminal offence in Zambia it is not possible for it to be deemed to be automatically incorporated in existing extradition treaties.

71. As for countries with which Zambia has extradition treaties in accordance with the Extradition Act, only those offences mentioned in the First Schedule are extraditable. Torture is not one of those offences and as such no extradition can be effected in this regard as Zambia, being a dualistic State, allows domestic legislation to prevail over international conventions.

Article 9

72. Although torture is not an offence under the Zambian Penal Code the Government views the offence with abhorrence. This is evidenced by Zambia's ratification of the Convention as well as the absolute prohibition of torture under article 15 of the Constitution. The courts, too, have registered their profound distaste for torture by rejecting confessions obtained by means of torture, and by awarding huge sums as damages to torture victims.

73. In this respect, Zambia is prepared to supply all evidence at its disposal if any State party requests such information in connection with criminal proceedings commenced against alleged torturers.

Article 10

Legislative measures

74. Section 9 of the Human Rights Commission Act (No. 39 of 1996) mandates the Human Rights Commission to, inter alia, establish a continuing programme of research, education, information and rehabilitation of victims of human rights abuse to enhance the respect for and protection of human rights.

Administrative measures

75. Administrative measures have been taken which require law enforcement training institutions to have a component of human rights as part of the syllabus. The following institutions have incorporated human rights training in their curriculum: the Zambia Police; the Zambia Prison Service; the Zambia Intelligence and Security Service; the Anti-Corruption Commission; the Drug Enforcement Commission; the Immigration Department; and the Judiciary.

76. In addition, a few training workshops for senior law enforcement officials who are already in service have been conducted with specific emphasis on law enforcement and international human rights standards at the Zambia Institute of Advanced Legal Education and at the Raoul Wallenberg Institute of Human Rights and Humanitarian Law of the University of Lund in Sweden. However, the number of officers trained in human rights is quite negligible and, therefore, there is great need for more training of law enforcement officers.

77. Unfortunately, no training concerning the Convention against Torture has, hitherto, been given to medical personnel. Another category of people that has yet to receive training in human rights is military personnel. The Human Rights Commission has, however, been notified about the provision in article 10 of the Convention regarding medical and military personnel. As already indicated above, the Human Rights Commission is mandated to conduct human rights education.

78. The Government also recognizes the need for members of the public to be provided with human rights education so that they know when a violation has occurred. This will enable them to take appropriate action to seek redress. Law enforcement officers will be deterred from inflicting torture if the public is alert and willing to take action against the perpetrators of torture.

Factors and difficulties

79. There are several factors and difficulties affecting the practical implementation of article 10. These include lack of training materials, qualified personnel and, more importantly, lack of a national policy on education and information dissemination to persons mentioned in the said article. Further, the training provided is general and does not adequately cover the provisions of the Convention. Although during the period under review a number of government officials were trained in human rights, a large proportion of them still remain untrained.

Article 11

80. Although Zambia does have rules governing the interrogation of suspects and regulations for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment, such rules and regulations have to date not been subjected to systematic review.

POLICE

Legislative measures

81. The Zambia Police Service falls under the Ministry of Home Affairs. It is established under article 103 of the Constitution. According to article 104, the functions of the Zambia Police are: to protect life and property; to preserve law and order; to detect and prevent crime; and to cooperate with the civilian authority and other security organs and with the population generally. The Zambia Police is regulated by the Zambia Police Act (Cap. 107), which, inter alia, makes provision for: the organs and structures of the Zambia Police; the recruitment of persons into the Service; terms and conditions of service of the members of the Service; and the regulation generally of the Zambia Police.

82. The Constitution and the Criminal Procedure Code (CPC) guarantee several rights for suspects, which are intended to minimize the incidence of torture. Article 13 of the Constitution provides that no one shall be deprived of his/her liberty except as may be authorized by law. The article further provides that any person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he/she understands, of the reasons for his/her arrest or detention. The police are required, without undue delay, to bring the person arrested or detained before a court of law. If a person detained is not tried within a reasonable time he/she must be released either unconditionally or upon reasonable conditions, in particular such conditions as are reasonably necessary to ensure that he/she appears at a later date for trial or for proceedings preliminary to trial. Any person who is unlawfully arrested or detained is entitled to sue for compensation in a court of law.

83. These constitutional provisions are reinforced by the CPC. Section 30 requires a police officer making an arrest without warrant to take or send the person arrested before a magistrate having jurisdiction in the case or before an officer in charge of a police station, without unnecessary delay. Furthermore, section 33 (1) of the CPC states as follows:

> "When any person has been taken into custody without warrant for an offence other than an offence punishable with death, the officer in charge of the police station to which such person shall be brought may, in any case, and shall, if it does not appear practicable to bring such person before an appropriate competent court within twenty-four hours after he was taken into custody, inquire into the case, and, unless the offence appears to the officer to be of a serious nature, release the person, on his executing a bond, with or without sureties, for a reasonable amount, to appear before a competent court at a time and place to be named in the bond: but, where any person is retained in custody, he shall be brought before a competent court as soon as practicable. Notwithstanding anything contained in this section, an officer in charge of a police station may release a person arrested on suspicion on a charge of committing any offence, when, after due police inquiry, insufficient evidence is, in his opinion, disclosed on which to proceed with the charge."

84. Thus, where a person is arrested without warrant, the police are required to produce that person before a magistrate within 24 hours of arrest, unless the circumstances make that impractical, for example, where the person is arrested on Friday night or during a holiday or the nearest magistrate is very far from the place of arrest and the police do not have transport, etc.

85. Section 123 of the CPC regulates the granting of bail. It provides as follows:

> "(1) When any person is arrested or detained, or appears before or is brought before a Subordinate Court, the High Court or Supreme Court he may, at any time while he is in custody, or at any stage of the proceedings before such court, be admitted to bail upon providing a surety or sureties sufficient, in the opinion of the police officer concerned or court, to secure his appearance, or be released upon his recognizance if such officer or court thinks fit:
>
> "Provided that any person charged with -
>
> "(i) murder, treason or any other offence carrying a possible or mandatory capital penalty;
>
> "(ii) misprision of treason or treason felony; or
>
> "(iii) aggravated robbery;
>
> "shall not be granted bail by either a Subordinate Court, the High Court or Supreme Court or be released by any Police Officer.

"(3) The High Court may, at any time, on the application of an accused person, order him, whether or not he has been committed for trial, to be admitted to bail or released on his own recognizance, and the bail bond in any such case may, if the order so directs, be executed before any magistrate.

"(4) Notwithstanding anything in this section contained, no person charged with an offence under the State Security Act shall be admitted to bail either pending trial or pending appeal, if the Director of Public Prosecutions certifies that it is likely that the safety or interests of the Republic would thereby be prejudiced.

"(5) Notwithstanding anything to the contrary contained in this Code or in any written law, it is declared for the avoidance of doubt that upon a person being convicted or sentenced by a subordinate court and before the entering of an appeal by such a person against the conviction or sentence or both, the Subordinate Court which convicted or sentenced such person or the High Court has and shall have no power to release that person on bail with or without securities."

86. Section 126 of the CPC prohibits the setting of excessive bail.

87. It is clear from these provisions that both the Constitution and the CPC require that any person taken into custody should be brought before an independent and impartial court of law within the shortest period possible (24 hours in the majority of cases). Moreover, those arrested and charged are entitled to be released on bond or on bail except for the most serious offences, for which no bail is available.

88. Article 15 of the Constitution, as already indicated above, prohibits the infliction of torture, inhuman or degrading punishment or other like treatment. There are no exceptions or derogations allowed. Even war or a state of emergency cannot justify a derogation from this absolute prohibition. This is stipulated in article 25 of the Constitution which allows derogations from fundamental rights and freedoms when the nation is at war or when a state of emergency is in force. Article 25 states as follows:

> "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of articles 13, 16, 17, 19, 20, 21, 22, 23,or 24 to the extent that it is shown that the law in question authorizes the taking, during any period when the Republic is at war or when a declaration under article 30 is in force, of measures for the purpose of dealing with any situation existing or arising during that period; and nothing done by any person under the authority of any such law shall be held in contravention of any of the said provisions if it is shown that the measures taken were, having due regard to the circumstances prevailing at the time, reasonably required for the purpose of dealing with the situation in question."

89. It may be noticed that the right to liberty guaranteed under article 13 may be derogated from when the nation is in a state of war or under a state of emergency. Preventive detention is allowed under the Emergency Powers Act (Cap. 108, 1964), which comes into operation when the President declares a state of emergency under article 30 of the Constitution. Under section 3 of the Act, the President is empowered to make regulations, including those providing for

detention without trial. Under emergency regulations, the President can detain persons who constitute a threat to public security for an indefinite period, while the police can detain persons without trial only for a maximum period of seven days (Emergency Regulations, Statutory Instrument No. 126 of 1997, Regulations 33 (1) and 33 (6), respectively).

90. However, those detained under emergency regulations are entitled to apply for a writ of habeas corpus in the High Court. Article 26 of the Constitution provides safeguards for those in preventive detention. It provides:

"(1) Where a person's freedom of movement is restricted, or he is detained, under the authority of any such law as is referred to in article 22 to 25, as the case may be, the following provisions shall apply -

"(a) he shall, as soon as reasonably practicable and in any case not more than fourteen days after the commencement of his detention or restriction, be furnished with a statement in writing in a language that he understands specifying in detail the grounds upon which he is restricted or detained;

"(b) not more than fourteen days after the commencement of his restriction or detention a notification shall be published in the Gazette stating that he has been restricted or detained and giving particulars of the place of detention and the provision of law under which his restriction or detention is authorized;

"(c) if he so requests at any time during the period of such restriction or detention not earlier than three months after the commencement thereof or after he last made such a request during that period, as the case may be, his case shall be reviewed by an independent and impartial tribunal established by law and presided over by a person, appointed by the Chief Justice who is or is qualified to be a judge of the High Court;

"(d) he shall be afforded reasonable facilities to consult a legal representative of his own choice who shall be permitted to make representations to the authority by which the restriction or detention was ordered or to any tribunal established for the review of his case; and

"(e) at the hearing of his case by such tribunal he shall be permitted to appear in person or by a legal representative of his own choice.

"(2) On any review by a tribunal under this article the tribunal shall advise the authority by which it was ordered on the necessity or expediency of continuing his restriction or detention and that authority shall be obliged to act in accordance with any such advice.

"(3) The President may at any time refer to the tribunal the case of any person who has been or is being restricted or detained pursuant to any restriction or detention order."

Prosecution of Offenders

91. The office of the Director of Public Prosecutions (DPP), which falls under the Ministry of Legal Affairs, is responsible for all prosecutions in the country. It is created under article 56 of the Constitution. The DPP is appointed by the President subject to ratification by the National Assembly. Under article 56 (3) of the Constitution, the DPP has power, in any case which he considers it desirable so to do,

> "(a) to institute and undertake criminal proceedings against any person before any court, other than a court martial, in respect of any offence alleged to have been committed by that person;
>
> "(b) to take over and continue any such criminal proceedings as have been instituted or undertaken by any other person or authority; and
>
> "(c) to discontinue, at any stage before judgement is delivered, any such criminal proceedings instituted or undertaken by himself or any other person or authority."

92. These powers may be exercised by the DPP in person or by state advocates or police prosecutors. In fact all prosecutions in the subordinate courts are undertaken by police prosecutors, who administratively fall under the Ministry of Home Affairs. This fact makes it difficult to prosecute police officers accused of inflicting torture, inhuman or degrading treatment on suspects. Owing to a severe shortage of qualified lawyers in Government, state advocates only undertake prosecutions in the High Court for the most serious offences. Only state advocates are directly under the office of the DPP. The fact that police prosecutors do not fall under the DPP and are, therefore, not accountable to him, undoubtedly makes it difficult for the DPP to supervise or control them.

Administrative and judicial measures

93. The rules adopted for interrogation are the English Judges Rules which:

(a) Permit a police officer or other law enforcement officer investigating an offence to question anyone, whether a suspect or not, from whom he thinks useful information can be obtained. This is so whether a person is in custody or not, so long as he or she has not been charged with the offence or informed that he or she may be prosecuted for it;

(b) Require a police officer or other law enforcement officer to caution a person he reasonably suspects to have committed an offence, before putting any questions to him on the suspected offence. The caution is to the effect that the accused has the right to remain silent and that anything he/she says may be used as evidence in a court of law;

(c) Require a further caution when such a person has been formally charged and is in custody or informed that he may be prosecuted. Only under special circumstances can questions be asked after these two stages and even then a caution must be administered;

(d) Provide for the taking down of a voluntary statement, the cautions and the authentication of such a statement thereafter;

(e) Refer to a case where a person is charged or informed of the likelihood of his/her prosecution and is made aware by a police officer or other law enforcement officer of a written statement of a co-accused. The law enforcement officer is required to hand to such a person a copy of such written statement but he/she must not be invited or induced to reply. If he/she chooses to reply he/she shall be cautioned according to Rule 3;

(f) Require persons other than police officers charged with the duty of investigating offences or charging offenders so far as is practicable to comply with these rules.

94. It is important to note that the Judges Rules are not rules of law but rules of practice. Thus, a confession obtained contrary to the Judges Rules can be admitted into evidence so long as it is voluntary. However, judges and magistrates have discretion to exclude a confession obtained in breach of the Rules.

95. The Zambian Judiciary has considered the Judges Rules to be merely directory rather than mandatory on law enforcement officers. However, the practice outlined in the case of Charles C. Lukolongo, Christopher C.P. Kambita and Isaac Lungu v. The People (1986) ZR 115 (SC) is that the courts are very reluctant to entertain any arrest or confession which is obtained in breach of the Judges Rules. This practice has become well settled and is religiously followed by Zambian courts.

96. A major flaw in the law is that although an involuntary confession may be ruled inadmissible, anything found as a result of the involuntary confession will nonetheless be admissible in evidence provided it is relevant to the issues before the court. In the case of Liswaniso v. The People (1976) ZR 297 (SC), in which illegally obtained evidence was admitted the Supreme Court held that although the law must strive to balance the interests of the individual to be protected from illegal invasions of his liberties by the authorities, on one hand, and the interests of the State to bring to justice persons guilty of criminal conduct, on the other hand, the answer does not lie in the exclusion of evidence of a relevant fact. The Court stated, inter alia:

> "On the authorities, it is our considered view that (the rule of law relating to involuntary confessions apart) evidence illegally obtained, e.g. as a result of an illegal search and seizure or as a result of an inadmissible confession is, if relevant, admissible on the ground that such evidence is a fact (i.e. true) regardless of whether or not it violates a provision of the Constitution (or some other law) ... But we wish to make it abundantly clear that any illegal or irregular invasions by the police or anyone else are not to be condoned and anyone guilty of such an invasion may be visited by criminal or civil sanctions. It seems to us good law that an involuntary confession should as a general rule be excluded because of the danger that it might be untrue but that the evidence of anything obtained as a result of an illegal act should be admissible because it is a relevant fact and therefore trustworthy. It would be difficult to appreciate how a court could consciously close its eyes to a relevant fact that has been presented before it."

97. The position taken by the judiciary unwittingly gives law enforcement officers a strong incentive to torture suspects since they know that any hard evidence obtained as a result of torture will be admissible in court. The fact that torture is not a criminal offence under Zambian law tends to create impunity among law enforcement officers for they know that they will not be prosecuted for perpetrating acts of torture.

Administrative practice

98. Zambia has put in place administrative practices as well as arrangements for custody and treatment of persons subjected to any form of arrest, detention or imprisonment, tailored to prevent torture. These include:

(a) Discouraging obtaining information from suspects through confessions;

(b) Intimidating methods of obtaining information from suspects are done away with by reducing the number of interviewers to a maximum of three;

(c) The use of the term "interrogations" has been done away with and replaced by the word "interview", so as to remove the stigma that goes with the term.

Factors and difficulties

99. Unfortunately, torture of suspects by law enforcement officers is widespread despite the measures outlined above.

100. There are several factors or difficulties that affect the practical implementation of article 11, among which are:

(a) Inadequate training in investigation skills leading to improper handling of suspects;

(b) Insufficient knowledge of human rights law by most law enforcement agents;

(c) The absence of a national forensic laboratory, resulting in the application of underhanded methods by overzealous officers;

(d) Lack of adequate financial resources and logistical support. The police do not have enough transport and other resources to enable them to conduct thorough investigations and therefore rely on the suspect to provide them with information;

(e) Supervising officers may be reluctant to expose perpetrators of torture to disciplinary action.

PRISONS

Legislative provisions

101. The Zambia Prison Service is created under article 106 of the Constitution and falls under the Ministry of Home Affairs. The Prisons Act (Cap. 97, 1966) contains regulations governing the treatment of persons subjected to detention or imprisonment. Further, with regard to the arrangements for the custody and treatment of persons, the Prisons Act contains provisions that are designed to deter and prevent the abuse and torture of prisoners and suspects. Section 16 (1) provides that the Minister may appoint as medical officer of a prison any medical practitioner. The Act also contains the following provisions:

"Section 17 (1) Subject to the provisions of this Act, the medical officer shall have the general care of the health of prisoners and shall visit the prison daily where practicable or when called upon by the officer-in-charge.

"(2) The medical officer shall report to the officer-in-charge any circumstance connected with the prison or the treatment of prisoners which appears to him to require consideration on medical or health grounds."

"Section 18 (1) The medical officer shall, where practicable ensure that every prisoner is medically examined on admission to and before discharge from a prison, and shall perform such other duties as may be prescribed, and shall ensure that a record is kept of the state of health of every prisoner."

"Section 43 (h) Any junior or Subordinate officer commits an offence against discipline if he is guilty of unlawful or unnecessary exercise of authority, that is to say, if he uses any unnecessary violence to any prisoner or other person with whom he may be brought into contact in the execution of his duty."

"Section 58 Every prisoner shall be searched on admission, and at such time subsequently as may be prescribed, by a prison officer of his or her own sex, but not in the presence of a person of the opposite sex, and all prohibited articles shall be taken from him or her."

Review and complaint system

102. The State has established the Police Public Complaints Authority under the Zambia Police (Amendment) Act (No. 14 of 1999) whose functions are outlined in paragraphs 39-42 above. Further, the State has established the Human Rights Commission whose functions and powers are stated in paragraphs 32-38 above.

103. Part XIX of the Prisons Act makes provision for visits to and inspection of prisons by judges, magistrates, the Minister and Deputy Minister of Home Affairs, and provincial ministers. All these are designated "visiting justices". Section 126 provides that any visiting justice may at any time visit a prison in respect of which he is a visiting justice, and may

"(a) call for all books, papers and records relating to the management and discipline of the prison;

"(b) visit every part of the prison and see every prisoner in confinement;

"(c) inspect and test the quality and quantity of prisoners' food;

"(d) ascertain, so far as possible, that the standing orders and rules are observed;

"(e) inquire into any complaint or request made by a prisoner; and

"(f) perform such other functions as may be prescribed."

104. Section 27 requires a visiting justice to enter in a book, to be kept for such purpose, such remarks, suggestions or recommendations for the information of the Commissioner of Prisons as he/she may deem fit.

105. The Minister of Home Affairs is, under section 128, empowered to appoint "official visitors" to any prison. These are required to visit prisons assigned to them at least once in every two months. Their functions are similar to those of visiting justices (sect. 129).

Administrative practice

106. The conditions prevailing in the prisons are extremely bad and can be said to constitute inhuman and degrading treatment. As can be seen from the tables in annex 1 the majority of prisons are overcrowded. In urban remand prisons the cells are so overcrowded that prisoners have to sleep sitting or in shifts. Prisoners are locked up in cells at 16.00 hours and let out at 07.00 hours.

107. Although overcrowding can be ameliorated by moving prisoners from one prison to another, this is difficult to achieve in practice because of lack of transport and also the fact that remandees and prohibited immigrants cannot be moved.

108. The cells are unhygienic and food is inadequate. The main diet consists of beans, maize meal and vegetables. Meat and chicken are rare. This is as a result of poor funding, as can be seen in annex 5.

109. Diseases such as tuberculosis, scabies, anaemia, dysentery, malaria, chest infections and other maladies are commonplace owing to low-protein diets, lack of clean water, severe overcrowding, and poor sanitation and medical facilities. The prisoners usually have little or no recreational facilities and they also do not have library facilities (see annex 3).

110. In an effort to decongest prisons the Government has opened up open-air prisons in various locations in the country.

111. As annex 4 shows, the ratio of prison officers to inmates is very low making it difficult for the prison authorities to adequately attend to the needs of prisoners and prevent abuse of prisoners by fellow inmates. Moreover, there is a high mortality rate among prison officers on account of diseases contracted from prisoners. For example, Kamfinsa Maximum Security Prison and Lusaka Central Prison are losing one prison officer every five months because of contact with sick prisoners. Although there is provision for the early release of terminally ill prisoners, this is difficult to achieve in practice because of the long, cumbersome procedures involved.

112. The provisions relating to medical officers and provision of medical facilities to prisoners and detainees have in practice proved difficult to implement because of lack of funds and personnel. Prisons do not have doctors, but a few have clinical officers who are seconded by the Ministry of Health.

113. Moreover, prison clinics are often not well stocked with the required drugs. The requirement of user fees at government hospitals and clinics results in some sick prisoners not being taken to these facilities because the prisons often do not have money to pay the user fees.

114. Most prisoners are discharged without being medically examined because of lack of medical staff.

115. It must be pointed out that the monitoring of prison conditions is not as effective as it should be. Non-governmental organizations, for example, have problems accessing prisons. Permission has to be sought from the Commissioner of Prisoners.

116. In terms of administrative measures, judges in practice visit prisons and police cells in order to investigate the living conditions. This usually takes place during High Court sessions held in various parts of the country. Similarly, magistrates also visit prisons and police cells but these visits are infrequent and in most cases do not present all persons who have been incarcerated with an opportunity to engage in dialogue with the visiting justices.

117. Following such visits justices make reports, which contain recommendations for the prevention of cruel, inhuman and degrading treatment. The prisons and police authorities, owing to inadequate funding, rarely implement such recommendations. Thus, the exercise offers no redress to inmates and becomes purely academic.

118. The Prisons Act provides for corporate punishment and restricted diets for prisoners who commit a breach of prison regulation. The confidentiality of medical records of prisoners is also not guaranteed. Although corporal punishment was outlawed and ruled unconstitutional by the High Court in John Banda v. The People (HPA/6/1998), discussed elsewhere in this report, the Prisons Act has yet to be amended to abolish corporal punishment.

119. The Government is committed to reforming the prison legislation in order to make it compatible with the Constitution as well as the country's obligations under the Convention and other international human rights instruments. In this regard the process of legislative reform is under way.

Article 12

Legislative measures

120. Under article 28 of the Constitution, if any person alleges that any of the provisions in the Bill of Rights has been, is being or is likely to be contravened in relation to him or her, that person may apply for redress to the High Court which shall hear and determine the matter and make such order or give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the rights infringed upon.

121. The Constitution also establishes, under article 125, the Human Rights Commission referred to earlier and whose functions and powers are contained in the Human Rights Commission Act No. 39, as outlined above. In addition, the Police Public Complaints Authority referred to above can investigate complaints against the Police, including complaints on torture.

122. Under the Inquiries Act (Cap. 41), the President may constitute a commission of inquiry to look into any matter in which inquiry would, in the opinion of the President, be for the public welfare.

Judicial measures

123. The courts in Zambia can hold a "trial within trial", or an inquiry, where allegations arise during court proceedings that a confession was extracted through torture. The purpose of the "trial within trial" is to establish whether the confession was made fairly and voluntarily by the accused. Where the court establishes, through this procedure, that the confession was extracted coercively under torture, it will exclude the confession from being tendered as evidence against the accused.

124. In the case of The People v. Stephen Lungu, Jack Chiti and Others, the presiding judge was appointed to chair a commission of inquiry, to run concurrently with the court proceedings, so as to make an inquiry possible during trial as the judge would stay proceedings whenever allegations of torture were raised by the accused persons.

125. After the "trial within trial", it is assumed that the complainant (accused person) will take up the issue in civil proceedings. However, the complaint faces two major difficulties:

(a) The "trial within trial" is part of criminal proceedings. Criminal proceedings cannot be used as evidence in civil proceedings; and

(b) The non-criminalization of torture could also pose problems in civil proceedings.

Administrative measures

126. An act of torture committed by a law enforcement agent is treated as a breach of the Code of Conduct and may, in some cases, amount to a crime, though not torture per se, but one that may attract sanctions under penal law. Where torture is alleged against a law enforcement agent, internal rules apply and disciplinary action may include suspension or dismissal.

127. During the period under review (18 months), the Zambia Police Service recorded a total of 32 cases in which acts of torture were alleged to have been committed by police officers. These cases have yet to be concluded by the relevant authorities.

128. In cases where an act of torture merits criminal investigations, the matter is referred to the Criminal Investigations Department (CID) of the Police Service. A docket is usually opened and transmitted to the Prosecutions Department, which then decides whether the act amounts to a criminal offence.

129. Where the Police Public Complaints Authority directs the Inspector General, the Anti-Corruption Commission, or a relevant body or authority under subsection 1 of section 57 (B) of the Zambia Police (Amendment) Act, the Inspector General, the Anti-Corruption Commission, or relevant body or authority shall give effect to such direction.

Factors and difficulties

130. The non-criminalization of torture in Zambian criminal law makes it difficult to charge perpetrators of torture.

131. The Human Rights Commission has no power to pass a binding decision on perpetrators of torture. It can only recommend to other appropriate authorities to take action.

132. Lack of institutional capacity and inadequate staff levels hinder the effective and prompt investigation of alleged acts of torture, as do lack of cooperation from law enforcement agents who might have vital information for an investigation and lack of logistics to respond promptly and effectively to human rights violations, in particular torture cases.

Article 13

Legislative measures

133. As pointed out above, articles 15, 28 and 125 of the Constitution are applicable.

Judicial measures

134. An individual who alleges that he has been subjected to torture in Zambia can sue the State through the Attorney-General. The courts in Zambia have heard cases of alleged torture and have handed down judgements. The following case is illustrative of the way courts have handled cases of torture.

135. In David Kataba Mwenjeke v. The Attorney-General, the applicant brought an action by way of an Originating Notice of Motion seeking a declaration, among other remedies, to the effect that the beating and torture he was subjected to by Zambia police officers at Woodlands Police Station on 23 September 1997 was unlawful and a violation of his guaranteed fundamental right under article 15 of the Constitution.

136. In this case, Justice E.E. Chulu found that the plaintiff was subjected to brutal and inhuman treatment. He was whipped repeatedly with a leather whip on his back and also repeatedly hit on his feet with a club. As a result, his feet were diffusely tender, and he also sustained multiple wounds on his limbs and lesions on his back. In the judge's view these were very serious aggravating circumstances, to be taken into consideration when determining a fair and reasonable award of compensatory damages. For the foregoing reasons, the Court awarded the plaintiff a sum of 20 million kwacha (approximately US$ 6,451) as compensatory damages, the sum attracting interest at the average short-term bank deposit rate from the date of judgement until full payment.

Administrative measures

137. The President, under the Inquiries Act, can constitute an administrative committee or commission of inquiry to investigate or inquire into any pressing issue. Using the above administrative mechanism, the President of the Republic of Zambia in 1998 appointed a commission of inquiry under Statutory Instrument No. 94 of 1998 to investigate and report on the allegations of torture, abuses or violations of human rights on the persons suspected of involvement in the failed coup of 28 October 1997 by members of the security and police forces as raised in the report of the Human Rights Commission dated 30 March 1998.

138. The ad hoc commission of inquiry mentioned above was constituted with the following terms of reference:

(a) To identify security and police officers, if any, involved in the acts of torture:

(b) In light of the findings, to recommend appropriate administrative and disciplinary measures that should be taken in order to avoid recurrence in the future of torture, abuse or violation of human rights during investigations by security and police forces and to recommend measures to improve on investigative methods by the forces;

(c) To make such recommendations, including the awarding of compensation where applicable, as it may in the light of the findings deem appropriate.

The Commission of Inquiry has since tendered its report to Government.

Factors and difficulties

139. Most people cannot afford to bring their cases before the courts. Further, insufficient institutional capacity within the Human Rights Commission hampers the effective examination of complaints received. Lack of awareness on the part of the citizenry on available complaints avenues means that cases go without redress.

Article 14

Legislative measures

140. As noted above, articles 15 and 28 of the Constitution apply. The High Court may make such order, issue such writs and give such direction as it may consider appropriate for the purpose of enforcing or securing the enforcement of article 15. A victim of torture may sue the Attorney-General for damages.

Judicial measures

141. The Zambian courts have ensured that a victim of torture obtains redress and has an enforceable right to fair and adequate compensation. This can be demonstrated by cases involving torture brought before the courts.

142. In the case of The Attorney-General v. Musonda Samuel Mofya (1995-97) ZR 49, the Supreme Court dismissed an appeal by the State against judgement awarded by the High Court in favour of the respondent for damages for torture, intimidation, trespass and false imprisonment. In that case Judge Gardner stated that:

> "We agree with the learned trial Judge that people in authority who inflict torture must be deterred and we hope that damages awarded will not be borne solely by the tax payer but those responsible should be made to feel the burden. Torture is so much to be condemned that damages for assault and torture should merely be as four times to the amount awarded in ordinary cases."

Administrative measures

143. A mechanism is in place for ex curia settlements where it is evident that the State has a bad case with regard to any claim for compensation. This mechanism has in the past been used by torture victims who have negotiated with Government for an amicable settlement. Although, according to the law and practice, the State has been paying compensation to victims of human rights abuses, a circular is in place to the effect that disciplinary action will be taken against law enforcement officers committing acts of torture, to recover money spent by the State to compensate torture victims. In the event that the plaintiff who seeks damages for torture dies, the courts provide for the compensation to be received by the surviving spouse, children or dependants.

144. Under section 10 of the Human Rights Commission Act, the Human Rights Commission has powers also to receive complaints from aggrieved persons and may, where it considers necessary, recommend the payment of compensation to a victim of human rights abuse or to such victim's family.

145. In Zambia no organized rehabilitation is available to victims of torture.

Article 15

Legislative measures

146. In Zambia there are no legislative provisions that prevent statements made as a result of torture being invoked as evidence in any proceedings.

Judicial measures

147. In judicial practice, in order for a confession to be admissible, it is necessary for the State to establish two things:

(a) That the accused made the confession; and

(b) That he/she made it voluntarily.

In order to ascertain that a confession was made voluntarily, the courts have through the years evolved a custom that has become well-established practice and is religiously followed by Zambian courts. This is the "trial within trial", the purpose of which was explained above.

148. In the case of Charles C. Lukolongo and Christopher C.P. Kambita and Isaac Lungu v. The People, a "trial within trial" was held to determine the voluntariness of a confession statement made by the accused. The Supreme Court, in quashing the decision of the High Court which had admitted the confession statement after conducting a "trial within trial", stated that where an accused person who had been severely beaten by the police and had as a result attended clinic for treatment, the only reasonable inference a judge could draw should be in favour of the accused because any such statement must be assumed to have been made during application of duress to induce the accused to confess. However, the Zambian courts have discretion to rule a free and fair confession inadmissible if the court determines that its admission would render the trial to be unfair to the accused. A major difficulty is that though a confession obtained through torture will be dismissed, there is no legal barrier to prevent the admission of any hard evidence obtained as a result of the confession.

Article 16

Legislative measures

149. National legislation exists in Zambia that is meant to prevent acts amounting to cruel, inhuman or degrading treatment or punishment.

150. Zambian criminal law does, however, provide for capital punishment in the Penal Code for certain serious offences. The legal method of execution is by hanging until the person is pronounced dead. Capital punishment is imposed for conviction on the following offences:

(a) Murder, unless there are extenuating circumstances;

(b) Aggravated robbery with a firearm, unless it is proved that the person was not aware that his accomplices used a firearm or, on becoming aware that a firearm was being used, he dissociated himself from the offence; and

(c) Treason.

151. Eight prisoners have been executed in the last 10 years (as at July 2000).

152. Under article 59 (c) of the Constitution, the President may substitute a less severe form of punishment for a death penalty imposed on a duly convicted person.

153. The Prisons Act (Cap. 97) provides for the management and control of prisons and prisoners lodged therein. The following provisions of the said Act are instructive:

"Section 15

"1. The minister may, whenever he deems it necessary or desirable, appoint a committee of two or more persons of whom:

"(a) one shall be the Commissioner or the Deputy Commissioner or an Assistant Commission;

"(b) the other or others shall be an officer or officers of the public service;

"to inquire into and report to him on the conduct, management or administration of any prison or any matter connected therewith or incidental thereto.

"2. For the purposes of any such inquiry as aforesaid, a Committee appointed under subsection (1) shall have the powers, rights and privileges conferred upon Commissioners by the Inquiries Act, and ... by a committee under this section and to any person summoned to give evidence or giving evidence before it."

154. Part IV of the Prisons Act* provides for the appointment and duties of medical officers by the Minister in charge of prisons. The sections under this Part are tailored for the general care of the health of prisoners.

155. Section 28 of the Act stipulates that "No subordinate officer shall punish a prisoner unless lawfully ordered so to do by the Commissioner or by an officer in charge."

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* Available for consultation with the secretariat.

156. Further, section 43(h) of Part VII provides that:

> "any junior or subordinate officer commits an offence against discipline if he is guilty or unlawful or unnecessary exercise of authority, that is to say, if he uses any unnecessary violence to any prisoner or other person with whom he may be brought into contact in the execution of his duty."

157. Part VIII of the Act provides in section 58 that:

> "Every prisoner shall be searched on admission, and at such time subsequently as may be prescribed, by a prison officer of his or her own sex, but not in the presence of a person of the opposite sex, and all prohibited articles shall be taken from him or her."

This is meant to avoid degrading treatment.

158. Section 60 in Part IX of the Prisons Act provides for the separation of male and female prisoners to prevent as far as is practicable their seeing or communicating with each other. Subsection 2 further provides the following classes of convicted and unconvicted prisoners of each sex:

(a) Young prisoners;

(b) Adults;

(c) First offenders;

(d) Prisoners with previous convictions;

(e) Prisoners suspected or certified as being of unsound mind;

(f) Such other classes as the Commissioner may determine.

159. Section 71 gives power to an officer in charge to order, on the advice of a medical officer, the removal of a seriously ill prisoner for purposes of treatment in a hospital. In emergency cases, the officer in charge need not wait for advice from the medical officer. This provision therefore ensures that prisoners are promptly attended to in the event of serious illness. Special measures may be put in place for the security of the prisoner while he is undergoing treatment if it is deemed necessary on account of the gravity of the offence for which a prisoner is in custody or for any other reason. (See Part IX of the Prisons Act.)

160. In addition to the substantive sections of the Prisons Act, there are in place Prison Rules made under the same Act designed to prevent cruel, inhuman or degrading treatment or punishment for persons held under custody of prison authorities. The following are the relevant rules:

"Rule 40 (1) Every medical officer or his subordinate shall:

"(a) where practicable, examine every prisoner before the prisoner is made to do or carry out work;

"(b) examine every prisoner ordered to undergo punishment for a prison offence if such punishment involves confinement in a separate cell or a reduction of the prisoner's normal diet and shall certify in writing whether in his opinion such punishment may be inflicted without the probability of serious injury being caused thereby;

"(2) After every medical examination carried out under section eighteen of the Act, the medical officer shall enter in the prisoner's record:

"(a) the state of health of the prisoner;

"(b) whether or not the prisoner has been vaccinated for, or has had smallpox;

"(c) any other information which he may consider desirable to record.

"(3) The medical officer shall, after medical examination of a prisoner, enter in the prisoner's record whether or not the prisoner is fit for normal labour and whether there shall be any restriction or condition regarding the type of labour to which the prisoner may be put."

"Rule 43 The medical officer shall report in writing to the officer in charge any case of a prisoner (other than a case to which rule 42 applies) which, in his opinion based on medical grounds, should be brought to the notice of the officer in charge and shall make such recommendations as he may think proper to the officer in charge as regards discipline or treatment of such prisoner or the supply of additional or alternative food or articles to such prisoner."

"Rule 45 Whenever the medical officer is of the opinion that:

"(a) the life of a prisoner is likely to be endangered by his continued imprisonment; or

"(b) a sick prisoner will not survive his sentence; or

"(c) a prisoner is totally and permanently unfit for prison discipline;

"he shall submit his opinion and the grounds thereof in writing to the officer in charge who shall forward the same to the Commissioner."

"Rule 47 "(a) At least once in every month the medical officer shall inspect every part of the prison and during such inspection he shall pay special attention to the sanitary state of the prison, the health of the prisoners, and the adequacy and proper cooking of the diets; and

"(b) review the weights of the prisoners."

"Rule 51 (1) Where there is an outbreak of infectious or contagious disease in a prison the medical officer shall give directions in writing to the officer in charge for:

"(a) separating prisoners having infectious or contagious diseases;

"(b) cleansing, disinfecting any room or cell occupied by any prisoner having an infectious or contagious disease; and

"(c) cleansing, disinfecting or destroying any infected clothing or bedding, if necessary;

"and the officer in charge shall carry such directions into effect forthwith.

"(2) The medical officer shall, in the case of any epidemic or highly infectious or contagious disease, or any other circumstances affecting the health of the prisoners requiring unusual measures, report the same immediately to the officer in charge."

"Rule 59 (1) The chief officer shall visit and inspect the whole prison and shall see every prisoner at least twice in every twenty-four hours and, in default of such daily visits and inspections, the chief officer shall record in his journal how far he has omitted them and the cause of such omission.

"(2) The chief officer shall be responsible for seeing that everything in the prison is clean and in good order and that all means of security are effective."

"Rule 73 The chief officer shall carry into effect all written directions of the medical officer respecting alterations in the diet or treatment of any prisoner."

"Rule 76 The chief officer shall report to the officer in charge:

"(a) every circumstance which may come to his knowledge and which is likely to affect the security, health or discipline of the prisoners, or the efficiency of the prison officers; and

"(b) any other matter may come to his knowledge which in his opinion may require the attention of the officer in charge."

"Rule 86 (1) No subordinate officer shall enter a prisoner's cell at night without being accompanied by another officer except in cases of imperative necessity and, in such circumstances, he shall make an immediate report to the officer who is in charge of the prison at the time.

"(2) No male prison officer shall enter any part of a prison in which female prisoners are confined unless he is accompanied by a women prison officer."

"Rule 88 Every subordinate prison officer shall inform the chief officer without delay of the name of any prisoner who desires to see the chief officer or who desires to make a complaint or application."

"Rule 89 All subordinate officers shall be responsible for the safe custody of prisoners under their charge and for the purpose of giving effect to this rule, they shall count the prisoners under their charge at least once every half hour, and shall do so:

"(a) on receiving charge of a party of prisoners;

"(b) on handing over the charge of the prisoners; and

"(c) on leaving any building or work whilst in charge of prisoners."

"Rule 94 Every prison officer shall direct the attention of the officer in charge or the chief officer to any prisoner who appears to him not to be in good health or whose state of mind appears to him to deserve special notice and care."

"Rule 103 (1) Every prisoner shall take or be made to take a bath on admission to a prison and at such times subsequently as may be ordered.

"(2) The officer in charge shall, if circumstances permit, cause every prisoner to be weighed immediately on his admission to a prison and once every month thereafter.

"(3) The weight of a prisoner determined at each weighing referred to in sub-rule (2) shall be recorded in the prisoner's record and in such books as the Commissioner may determine.

"(4) The officer in charge shall notify the medical officer of any substantial change in the weight of any prisoner."

"Rule 141 (1) A prisoner may make any complaint or application to a visiting justice, an official visitor, the Commissioner, the officer in charge or the chief officer, and, in the case of a female prisoner, to the senor woman prison officer, but no complaint shall be made to any subordinate officer except to report sickness.

"(2) The officer in charge shall make arrangements to ensure that any request made by a prisoner to see the Commissioner, an official visitor or a visiting justice is recorded by the officer to whom it is made and that such request is conveyed without delay to the officer in charge who shall inform the Commissioner, official visitor or visiting justice when such person next visits the prison or such request.

"(3) All complaints and applications made by prisoners shall be heard or attended to by the officer in charge every day except Sundays or public holidays, and the officer in charge shall record in a book kept for the purpose the action taken in each case."

"Rule 166 A prisoner who is on remind or awaiting trial shall, if necessary for the purposes of his defence, be allowed to see a registered medical practitioner of his own choice, at any reasonable time, in the sight but not in the hearing of the officer in charge or any prison officer detailed by the officer in charge for the purpose."

"Rule 170 (1) Every prisoner sentenced to penal or reduced diet as a punishment for a prison offence shall, before undergoing such punishment, be examined by the medical officer who shall certify the prisoner's fitness to undergo such punishment.

"(2) A prisoner shall not be made to undergo a punishment of penal or reduced diet within a period of twenty-four hours immediately preceding the day of his discharge or, if circumstances permit, on the day preceding his appearance before a court."

"Rule 172 The medical officer shall, at the infliction of every sentence of corporal punishment on a prisoner, give such instructions as may be necessary for preventing injury to the health of the prisoner and the officer in charge shall carry such instructions into effect."

"Rule 173 (1) For the purpose of subsection (5) of section one hundred and two of the Act:

"(a) The type of cane with which corporal punishment shall be inflicted shall be:

"(i) in the case of a prisoner under the age of nineteen years, a rattan cane, three feet long and not more than three-eighths of an inch in diameter;

"(ii) in the case of a prisoner who is nineteen years of age or over, a rattan cane, four feet long and not more than half an inch in diameter;

"(b) The manner in which corporal punishment shall be inflicted shall be as follows:

"(i) a blanket or similar form of protection shall be placed across the small of the prisoner's back above the buttocks;

"(ii) a small square of thin calico shall be dipped in water; wrung out and tied over the prisoner's buttocks;

"(iii) strokes shall be administered from one side upon the buttocks of the prisoner and on no account on the back.

"(2) No corporal punishment shall be inflicted on a prisoner in the presence of another prisoner or prisoners."

"Rule 180 (1) No prisoner shall be placed under mechanical restraint as a punishment.

"(2) No prisoner shall be placed in fetters except as means of restraint or to prevent escape of a prisoner and only fetters of a pattern which has been approved by the Commissioner may be used.

"(3) The officer in charge may order the use of handcuffs for prisoners who are in course of transfer from one point to another:

Provided that it shall not be permitted under any circumstances to place prisoners in leg irons who are in course of transfer from one prison to another.

"(4) The officer in charge may place a prisoner under mechanical restraint if he considers it necessary for the safe custody of the prisoner, and the particulars of every such case shall be recorded in the journal of the officer in charge and of the Chief officer and in the restraint book; and notice thereof shall be given immediately to the medical officer and the Commissioner:

Provided that any mechanical restraint applied under this sub-rule shall not be continued for more than twenty-four hours unless the Commissioner has given his consent and the Commissioner's consent shall be confirmed in writing:

"(5) Where a prisoner is kept under mechanical restraint beyond the period of twenty-four hours, the officer in charge shall obtain from the medical officer a certificate as to the fitness of the prisoner to undergo such restraint. The consent referred to in sub-rule (4) and the medical certificate issued under this sub-rule shall be preserved by the officer in charge and shall be regarded as his authority for applying such mechanical restraint beyond twenty-four hours."

"Rule 210 (1) During a visit of inspection by a visiting justice or official visitor, neither the officer in charge nor the next senior prison officer shall accompany him, but the officer in charge or next senior officer shall inform such visiting justice or official visitor of any prisoner who has expressed an intention to see him and shall afford him every assistance in his inspection and shall detail a prison officer to accompany him.

"(2) No person other than a prison officer or a prison employee shall be permitted to accompany a visiting justice or official visitor during the course of his inspection.

"(3) A copy of the visiting justice's remarks, together with any comments by the officer in charge, shall be forwarded to the resident magistrate in whose jurisdiction the prison is situated and to the Commissioner immediately after the inspection has taken place.

"(4) A copy of the official visitor's remarks, together with any comments by the officer in charge, shall be forwarded to the Commissioner immediately after the inspection has taken place."

161. Other provisions aimed at preventing cruel, inhuman or degrading treatment or punishment exist under the Criminal Procedure Code (Cap. 88). Section 21 provides that a person who is arrested shall not be subjected to more restraint than is necessary to prevent his escape. Women, under section 24, must be searched by other women with strict regard to decency.

162. Further, the Zambia Police (Amendment) Act has provisions meant to prevent cruel, inhuman or degrading treatment or punishment under section 18 (a) (1). The officer in charge of a police station or post or any other officer authorized by the Inspector General can designate a number of police officers from among the police officers serving at the police station or post as custody officers.

163. During the period January 1998 to March 2000 no prisoner underwent corporal punishment for an offence against prison discipline or for having violated the Prison Rules. A total of nine prisoners underwent penal diet (restricted diet) as punishment for breaching the Prisons Act.

164. Under section 18 (a) (2) the officer in charge shall ensure that there is in attendance at the station or post at least one male or female custody officer. The duties of the custody officer are to ensure that:

"1. (a) A person in police custody is treated in a decent and humane way;

"(b) A person in police custody who requires medical attention has access to medical facilities;

"(c) Police cells or other places used for the custody of persons are in a clean and habitable condition; and

"(d) Necessary provisions and other facilities used by a person in custody are in a hygienic condition.

"2. A person shall, before being placed in police custody, be presented to the custody officer;

"3. Where a person is presented to a custody officer under the above subsection the custody officer shall:

"(a) record the name, the offence for which the person is arrested, and the state or condition of the person; and

"(b) make such recommendations as to that person's well-being as are necessary including the requirement for that person to have medical attention."

Administrative measures

165. In order to counter incidents of cruel, inhumane or degrading treatment or punishment involving persons under the custody of State authorities, a number of administrative measures have been taken, including the following:

(a) To facilitate decongestion, the trend is towards the establishment of open-air prisons;

(b) Immigration authorities have adopted the practice of issuing temporary permits for Prohibited Immigrants (PIs). The temporary permit allows the PI to stay in Zambia for a short time. Families, if any, can provide logistics, including money, to have the PI removed from custody. The Immigration Department also collaborates in terms of logistics to remove PIs. Public transport is also utilized to transport PIs to borders;

(c) To overcome the shortage of food and the generally bad diet, prison authorities allow prisoners to receive food from outside provided by friends and relatives. Prisons have also embarked on farming to supplement prison food requirements;

(d) In some places, new police posts are being built with the help of the community. These new posts are intended to provide, among other things, better toilet facilities in cells and accommodation for officers;

(e) To overcome mixing adults with juveniles due to congestion, prisons are now turning penal blocks into cells to accommodate juveniles;

(f) Female suspects are bonded where there is no female detaining facility.

Judicial measures

166. The Judiciary in Zambia has reacted to certain legal provisions which it considers amount to inhuman or degrading punishment. In the case of John Banda v. The People, the appellant pleaded guilty to and was convicted of malicious damage to property. In addition to one month's simple imprisonment suspended for 12 months, the appellant was ordered to receive 10 strokes of a cane in accordance with sections 24 (c) and 27 of the Penal Code, which provide for corporal punishment. In holding sections 24 (c) and 27 of the Penal Code as unconstitutional, Justice E. E Chulu stated:

> "Upon consideration of the law before me, I hasten to point out that the Republican constitution, which is a written Constitution of Zambia, is the Supreme law of the land, and consequently, all other laws derive their force of law from it, and are therefore subordinated to it. This being the legal position, it cannot therefore be doubted that unless the Constitution is specifically amended, any provisions of an Act of parliament that contravenes provisions of the Constitution is null and void.
>
> "Article 15 of the Constitution is couched in very clear and unambiguous language, that no person shall be subjected to torture or to inhuman or degrading punishment or other like treatment. On the contrary, it cannot be doubted that the provisions of sections 14 (c) and 27 of the Penal Code which permit the infliction or imposition or corporal punishment of offenders are in total contravention, and conflict with the above provisions of article 15 of the Constitution."

167. Judge Chulu further stated that due to the unconstitutionality of sections 24 (c) and 27 of the Penal Code, the provisions should be served from the Penal Code.

168. Further, Zambian courts, in a bid to reduce congestion, which leads to inhuman conditions in prisons, have minimized custodial sentences in favour of community service, probation and fines, especially for minor offences.

Factors and difficulties

169. While the State has put in place legislative, administrative and judicial measures to try and reduce acts or omissions, which lead to cruel, inhuman or degrading treatment or punishment, there are several factors which make their realization difficult. They include the following:

(a) The judgement in the John Banda case, cited above, outlawing corporal punishment as being inconsistent with article 15 of the Constitution faces problems of implementation because the ruling is not yet settled law. Sections 24 (c) and 17 of the Penal Code which provide for corporal punishment have yet to be severed from it and corporal punishment is still provided for in the Prison Rules as cited above. Further, the ruling is not readily available to magistrates, especially in the rural areas, due to poor law reporting;

(b) The inadequate number of detention and prison facilities in the country has led to congestion, which has created inhuman conditions for persons subjected to detention. Thus, it is practically difficult to implement the requirements contained in Prisons Rule 51 (1) cited above (see annex 1);

(c) The inadequate number of detention facilities in the country has lead to congestion, which has created inhuman conditions for persons subjected to detention (see annexes 1 and 2);

(d) Limited resources have lead to inability on the part of the State to built more and better prison facilities and to maintain those already existing. The resulting congestion causes easy transmission of communicable diseases such as TB. Further, prison authorities are not in a position to provide adequate medical and health facilities. Most prison clinics have inadequate supplies of drugs and sometimes the nearest health centre is tens of kilometres away. Meals and prison uniforms are also inadequate and most prisons have poor sanitary facilities (see annex 3).

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